United States

DEPARTMENT OF JUSTICE AUTHORIZATION

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

NINETY-EIGHTH CONGRESS

FIRST SESSION

ON

DEPARTMENT OF JUSTICE AUTHORIZATION

MARCH 15, 1983

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WITNESS

DEPARTMENT OF JUSTICE AUTHORIZATION

TUESDAY, MARCH 15, 1983

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met at 10:30 a.m. in room 2141 of the Rayburn House Office Building, Hon. Peter W. Rodino (chairman) presiding.

Present: Representatives Rodino, Kastenmeier, Edwards, Seiberling, Mazzoli, Hughes, Schroeder, Glickman, Frank, Morrison, Smith, Fish, Moorhead, Hyde, Kindness, Sawyer, Lungren, Sensenbrenner, Shaw, Gekas, and DeWine.

Chairman RODINO. The committee will come to order.

I recognize the gentleman from California.

Mr. EDWARDS. Mr. Chairman, I ask unanimous consent that the committee permit the meeting this morning to be covered in whole or in part by TV broadcast and radio broadcast.

Chairman RODINO. Without objection, it will be so ordered.

This morning it's a pleasure to welcome the Attorney General of the United States, William French Smith, for the committee's annual hearings concerning the authorization for the Department of Justice for the upcoming fiscal year.

Each of our subcommittees is or will be holding oversight hearings on the various units within the Department of Justice, and we will now turn to the testimony from the Attorney General about the overall plans for the Department.

The Attorney General's statement discusses the details of the Department's plan concerning the authorization level and I'm hopeful, Mr. Attorney General, that while we do have that statement and we will insert it in the record, if you might summarize it it will allow the members an opportunity to question.

I might say, Mr. Attorney General, that there is considerable interest in this committee in a problem that is of concern to all of us and that is the question that has developed concerning the Attorney General having information which was requested by the Congress of the EPA. Questions have arisen as to the Department of Justice's role in pursuing the congressionally authorized contempt citation.

Specifically, questions have arisen concerning the apparent conflicts of interest in the numerous roles the Department of Justice has played and continues to play in this matter. Questions have also been raised concerning the Department's apparent unwillingness to enforce the Federal statute which provides criminal penalties for contempt of Congress.

The committee is also interested in how the Department functioned in the decisionmaking process to withhold information from the Congress, and I want to state emphatically on behalf of the committee that we do not approach these questions with any partisan purpose. Our interest evolves from the crucial issues of separation of powers and of the constitutional prerogatives of the House. These issues of constitutional magnitude are important and this committee has been requested by several other committees and subcommittees of the House to begin a preliminary review of these questions as part of its historically careful treatment of such major constitutional questions.

So I'm sure that you, Mr. Attorney General, will not be taken by surprise if the members show intense interest in this matter.

I now recognize the ranking minority member, Mr. Fish, for any opening remarks he wants to make.

Mr. FISH. Thank you very much, Mr. Chairman. I'm most pleased to welcome the Attorney General here this morning to discuss the authorization and appropriations of the Department of Justice for fiscal 1984. I think you deserve congratulations, Mr. Attorney General, for bringing in a proposed budget that is a 15.3-percent increase over this current budget. There must have been some victory in the budget process this year because it does provide a substantial increase in resources to combat the forces of organized crime and drug traffickers as well as others, and the Department has earned a good record in its organized drug efforts. These additional resources should permit the Department to do even better.

On the legislative front, I want to commend the Department for its leadership once again in the immigration reform and control and the Crime Control Act that we will be receiving shortly. These deserve our most concerted efforts on this committee.

Therefore it's my hope, Mr. Chairman, that this very ambitious program of the Department of Justice is not overlooked today by discussions of other questions and I commend you, Mr. Chairman, for your approach to the matters at hand.

Certainly the proposed authorization is one of the most significant in years and deserves our full attention. Thank you.

Chairman RODINO. Thank you very much, and I would state to members of the committee that we will proceed under the 5-minute rule. Each member will be allowed 5 minutes in the initial round to ask questions of the Attorney General after the Attorney General has presented his statement.

You may proceed.

TESTIMONY OF HON. WILLIAM FRENCH SMITH, U.S. ATTORNEY GENERAL

Mr. SMITH. Thank you, Mr. Chairman. I will abbreviate somewhat the remarks that I have prepared here as you have requested. There are some aspects that I think are important to emphasize and I will therefore proceed on that basis, if that's satisfactory.

I'm requesting today a budget of $3.4 billion for 55,431 positions and 58,249 full-time equivalent work-years. That is an increase of 1,346 full-time equivalent work-years over the number allocated to

the Department in fiscal year 1983. And the dollar amount of the budget represents a 15.3-percent increase over the amount of budget authority expected for the current fiscal year.

Department officials have been and will continue to appear before you to answer specific questions you may have concerning programs under their direction. At this time, I would like to dwell on the most notable feature of this budget—its request for resources to deal effectively with crime.

This budget provides funding for our attack on drug-related crime, for extensive new prison and jail construction, and for the large-scale application of modern technology to the Federal justice system. The budget reflects our considered approach to applying resources in a balanced manner across the justice system. Our approach recognizes and supports the interrelationship of the various components of the system, which include investigations, prosecutions, corrections, and prisons, and Federal assistance to States and localities.

Let me briefly discuss the problems we have identified in the fight against crime and how we propose in this budget to deal with them.

First, this budget addresses the need for investigators. The budget continues funding for 760 Department of Justice investigative staff who will be participating in regional drug task forces with funding provided also for an additional 500 investigators and support staff in the appropriations for the Department of the Treasury.

Second, this budget addresses the need for more prosecutors. The budget completely funds the 340 prosecutorial staff together with the 1,260 investigative staff in the Departments of Justice and Treasury, reflect the President's decision to commit a staff of 1,600 persons to the fight against drug-related crime. The budget also continues funding the 78 positions obtained last fall for the South Florida Drug Task Force.

Third, this budget addresses the shortage of space available for incarcerating Federal prisoners. Federal prisons already are overcrowded; they have 23 percent more inmates than their rated bedspace can hold. The problem of insufficient space doubtless will be exacerbated as we increase our investigative and prosecutorial efforts.

Our budget request contains $96 million for new Federal prison capacity. It requests funds for construction of one 500-bed Federal correction institution in the Northeastern United States. It asks for planning and site acquisition funds for a second 500-bed FCI in the Northeast, construction of a 500-bed metropolitan correctional center in Los Angeles, an additional 340 bedspaces at existing Federal facilities—780 such bedspaces were funded in 1983—and funds for a number of modernization and rehabilitation projects throughout the Federal Prison System. The budget includes also an additional $6 million for contract community treatment centers that would hold eligible Federal prisoners nearing their time for release.

The $96 million requested here builds on the $57 million provided for prison construction last fall through a 1982 supplemental

appropriation and the 1983 budget amendment requested by the President.

Fourth, this budget addresses the need for more space for Federal prisoners who have yet to be sentenced. It is best if unsentenced Federal prisoners can be kept in facilities located relatively close to Federal courts.

The budget also requests an additional $10.5 million for the support of the U.S. prisoners program. This represents a 31-percent increase over last year. An additional $10 million is provided through the organized crime drug enforcement initiative for the Marshals Service's cooperative agreement program. The latter goes beyond the $5 million provided for CAP in the 1983 organized crime drug enforcement initiative.

The CAP effort provides State and local detention facilities with funds for equipment, remodeling and, in some cases, construction of more bedspace. This construction takes place upon agreement that a number of bedspaces in local jails will be available for housing Federal prisoners in the custody of the Marshals Service. The CAP effort is critical to reopening the dozens of local facilities that in the past 5 years have quit offering space, or else offered much less space, for housing Federal prisoners.

Fifth, this budget addresses the need for improved technology for the Federal justice system. It includes more than $175 million in new funding for automatic data processing, data telecommunications, voice privacy radio systems, litigation support systems, and office automation for Justice investigative, prosecutive, and litigative activities. This money specifically will assist the FBI, DEA, and the Immigration and Naturalization Service as each enhances its automatic data processing capability. In addition, the funds will facilitate completion of the FBI's Automated Identification Division System. This system will enable us to identify, within 24 hours, fingerprints taken in criminal investigations. As for the voice privacy radio system, it will enable agents in the street to communicate more effectively and securely with one another.

Sixth, this budget addresses the need to support worthy State and local assistance intitiatives. Soon we will be forwarding legislation on this matter. The bulk of the $90 million we will seek would match dollar for dollar truly effective State and local criminal justice efforts.

Seventh, this budget seeks to improve recordkeeping by the INS. It includes $10 million request for establishment of an INS National Records Center. Inasmuch as INS will be converting to automatic data processing, thanks in part to the $17 million included in the general request for improved technology that I mentioned earlier, the new center should enable INS to maintain a more accountable and up-to-date records system.

Eighth, this budget addresses the need for an increased foreign counterintelligence capability. We seek more support both for staff and operations in the FBI's ability to deal with known and suspected hostile foreign intelligence agents operating within the United States. The budget also recognizes the need for additional FBI staff to counter the intense efforts by hostile foreign intelligence services to gain access to sensitive American technology.

Last, the budget addresses the need for personnel in key areas by including funds for more than 500 new positions. These are in addition to the positions that will be funded through the organized crime drug enforcement initiative and the FBI's foreign counterintelligence program.

Of these 500 new positions, 185 would be allocated to the FBI. Some 160 of these individuals would implement the Bureau's voice privacy and ADP initiatives. Another 25 would be assigned to a hostage rescue team based in the FBI's Washington, D.C., field office.

Thirty-five other positions would go to the Drug Enforcement Administration. The new positions would be used in the DEA's foreign cooperative investigations, laboratory, ADP, and technical field support programs.

Another 212 positions will be created within the Federal Prison System, the majority in its medical services program. And 31 individuals would be added to the U.S. Marshals Service to provide additional court security under an agreement we reached with the Chief Justice last spring.

The remaining 37 new employees would work in the areas of prosecution and litigation. The Civil Rights Division would have 15 new staff members who are needed to assist our prosecution of criminal civil rights violations and handle the increased workload expected as a result of the 1982 extension and amendment of the Voting Rights Act. The U.S. attorneys would be given 32 new positions mainly to help in civil litigation. The administration plans to maintain the size of the prosecutive staff added by the Congress in 1983 to the U.S. attorney's office for the District of Columbia.

The budget does not include funding for juvenile justice grants, State, and local drug grants, and the service of private process program in the U.S. Marshal Service. These reductions would save almost $85 million. The proposed termination regarding the private process program builds upon Public Law 97-462, signed January 12, 1983, which had already effectively minimized the Marshals Service role in that area.

Another proposed reduction would save $10 million in the INS detention and deportation program. In 1982 Congress funded the operation of the Fort Allen, Puerto Rico, Service Processing Center, which was activated for the Haitian detention effort. Since there is no need for Fort Allen, the funds for its operation can also be eliminated.

Mr. Chairman, I believe our programs promise a highly effective attack on all forms of crime, but especially drug related and organized crime. This budget will require substantial new expenditures, but the total cost will probably be less than what is spent in 1 week on illegal drugs in this country. Indeed, it will be less than what is spent in 1 week on many Federal programs.

On a number of occasions, the President has stated that his commitment to the war on crime, especially in drug trafficking, is unshakable. I share that unshakable commitment. We intend to do what is necessary to end the drug menace and cripple organized crime. This budget will help accomplish just that. It is a comprehensive and carefully crafted budget that will improve law enforcement efforts throughout the Department of Justice. Although the

battle cannot be won quickly, I firmly believe it can be won. I ask this committee to join us in the fight.

In addition to our budgetary commitment to the fight against crime, this administration is strongly committed to working with the Congress to achieve much needed legislative reforms. This fact is underlined by the President's proposed Comprehensive Crime Control Act of 1983.

The bill which the President will send to Congress within the next few days is a comprehensive package of reforms designed to restore a proper balance between the forces of law and the forces of lawlessness. It is not necessarily intended to be processed as a single piece of legislation. However, it does establish our legislative agenda for the 98th Congress and it does include the measures we need to strengthen our ability to fight crime effectively.

This morning I would like to outline the bill's most important provisions. Title I concerns bail reform and would permit the courts to consider a defendant's danger to the community when setting bail. It would reverse the presumption in current law in favor of granting bail after conviction. And it would provide for revocation of bail and increased penalties for crimes committed by persons released on bail.

The bill also provides for comprehensive sentencing reform. It would abolish the current system of parole. It would establish a commission to set sentencing guidelines, and it would allow appeals of sentences not within the guidelines.

We also seek reform of the exclusionary rule in order to permit the introduction of critical evidence while achieving more precisely the goal of deterring illegal police conduct. Under our proposal, evidence would not be excluded if law enforcement officers seized the evidence with a good-faith, objectively reasonable belief that their conduct was within the law.

We would amend the law of forfeiture to provide for the forfeiture of the profits and proceeds of organized crime enterprises and drug trafficking enterprises. We would obtain authority to "freeze" forfeitable assets pending judicial proceedings. We would be permitted to obtain the forfeiture of substitute assets when other assets have been removed from the reach of the Government.

The bill would provide for a much-needed amendment of the insanity defense. Under the proposal we now advance the defense would be available only for those individuals who are unable to appreciate the nature or the wrongfulness of their acts. Those who make such a claim would bear the burden of proof by clear and convincing evidence. Our proposal would also eliminate expert testimony on the ultimate issue of sanity or insanity and would for the first time provide a Federal procedure for commitment of individuals found not guilty by reason of insanity.

Our legislation also proposes many other changes. One is reform of the habeas corpus procedures to require Federal deference to full and fair State court proceedings and to limit the time for filing habeas corpus cases.

Another would strengthen the penalties for drug violators and strengthen the DEA's ability to prevent diversion of legitimate drugs to illegal purposes.

In discussing badly needed legislative initiatives in the administration of justice, I would be remiss if I did not also mention the proposed Immigration Reform and Control Act of 1983. This legislation, recently introduced in both Houses of the 98th Congress, would increase the law enforcement powers of the Immigration and Naturalization Service by imposing sanctions on those who knowingly hire illegal aliens. And it would reform and expedite our procedures to return those who came or remain here illegally. At the same time, the bill would deal realistically with illegal aliens who are now here—and safeguard against discrimination—by granting them a legal status. Failure to enact reform legislation of this kind can only result in further illegal migration, greater public frustration over the Government's inability to control our borders, and the negative social and economic effects occasioned by so large a number of persons living outside the law.

Mr. Chairman, that concludes my remarks. I am, of course, ready to answer any questions you or the members of the committee may have.

[Complete statement follows:]

Department of Justice

STATEMENT

OF

WILLIAM FRENCH SMITH
ATTORNEY GENERAL

BEFORE

THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

CONCERNING

DOJ AUTHORIZATION

ON

MARCH 15, 1983

It is a great pleasure for me to be here as the first Attorney General in many years to request significant increases in the resources available to federal law enforcement. The budget under consideration by this Committee provides for the first time funding of more than $3 billion for the Department of Justice and more than $1 billion for the Federal Bureau of Investigation.

Although I appear before you to discuss our next budget, that budget can be fully understood only in the context of what has come before. This budget seeks a substantial increase in our resources -- especially to combat organized crime and drug trafficking -- and it builds upon previous accomplishments made despite more limited resources.

We have brought greater coordination to law enforcement at all levels of government by establishing Law Enforcement Coordinating Committees composed of federal, state, and local law enforcement officials in federal judicial districts throughout the country.

For the first time, we have brought the FBI into the fight against drug trafficking to assist the Drug Enforcement Administration. There have been more than 1100 drug investigations involving the FBI, roughly one-third of which have been joint investigations with DEA.

We have indicted and convicted many of the leaders of organized crime considered untouchable by many just a few years ago. In fact, some 350 members and associates of traditional organized crime families have been convicted over the last two years. Another 300 are awaiting trial.

Building upon the coordination exhibited by the South Florida Task Force, twelve new regional task forces to combat organized drug trafficking are becoming operational and have begun work on their first cases.

We have worked with the Congress in assembling one of the most significant packages of proposed criminal law reforms in our Nation's recent history.

We have also worked with the Congress in drafting the most important proposed reform of our Nation's immigration laws in decades -- and have improved the effectiveness of the Immigration and Naturalization Service while awaiting passage of the kinds of reforms necessary to regain control of our borders.

We have vigorously enforced our civil rights laws -- and brought more criminal cases than any prior Administration during a comparable period of time.

We have brought antitrust enforcement back to the real economic world to punish and deter truly anti-competitive activity. We filed more criminal cases in fiscal 1982, for example, than any prior Administration did in one year -- more than three times the average for each year in the last decade.

We have launched a major civil litigation effort to protect the public treasury against fraud and abuse -- and have collected more than $200 million owed to the government in the last fiscal year alone.

These are merely a few of the significant accomplishments of the past. The fiscal year 1984 budget envisions many more accomplishments -- and requests the new funding needed to make them a reality. Our previous efforts have

benefited in many instances from the advice and support of the Congress -- and our future endeavors will also need the same kind of mutual understanding and assistance.

Mr. Chairman, I am requesting today a budget of $3.4 billion for 55,431 positions and 58,249 full-time equivalent work years. That is an increase of 1,346 full-time equivalent work years over the number allocated to the Department in fiscal year 1983. And the dollar amount of the budget represents a 15.3 percent increase over the amount of budget authority expected for the current fiscal year.

Department officials have been and will continue to appear before you to answer specific questions you may have concerning programs under their direction. At this time I would like to dwell on the most notable feature of this budget -- its request for resources to deal effectively with crime.

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Another would strengthen the penalties for drug violators and strengthen the DEA's ability to prevent diversion of legitimate drugs to illegal purposes.

In discussing badly needed legislative initiatives in the administration of justice, I would be remiss if I did not also mention the proposed Immigration Reform and Control Act of 1983. This legislation, recently introduced in both Houses of the 98th Congress, would increase the law enforcement powers of the Immigration and Naturalization Service by imposing sanctions on those who knowingly hire illegal aliens. And it would reform and expedite our procedures to return those who came or remain here illegally. At the same time, the bill would deal realistically with illegal aliens who are now here -- and safeguard against discrimination -- by granting them a legal status. Failure to enact reform legislation of this kind can only result in further illegal migration, greater public frustration over the government's inability to control our borders, and the negative social and economic effects occasioned by so large a number of persons living outside the law.

Mr. Chairman, that concludes my remarks. I am, of course, ready to answer any questions you or the members of the Committee may have.

Chairman RODINO. Thank you very much, Mr. Attorney General.

First of all, might I say, Mr. Attorney General, that as chairman of the committee, I'd like to express my appreciation for the many courtesies that we have always found in your Department, the willingness to at least try to bridge the gap that sometimes exist. It's been a pleasure to work with your deputy and try to get whatever information is available. We haven't always succeeded, but nonetheless, I'm sure that there has from time to time been some difficulty, but I'm sure that the intent was always to try to accommodate the requests of the Congress.

I want to state initially, too, that your statement is a statement that suggests a very ambitious program, a very comprehensive program, in which you seek to discharge your responsibility as the chief law enforcement agency of the Government and we want to be as helpful and as cooperative as we possibly can be consistent with our own responsibilities within the area of our jurisdiction.

We know that the problem of crime is one that plagues all of us. The problem of drug addiction and trafficking in drugs and all these are matters of deep concern to us. The overhauling of the Criminal Code is a matter that we've dealt with for a period of time. We have found that we can't digest it all at one sitting in one Congress and you have suggested in your statement now that you recognize that we should consider at least dealing with these matters incrementally and we hope that we are going to be able to do so. We have tried to do so. We will continue to do so.

I think this committee finds itself always attempting to cooperate with the Department in obtaining information from you. We feel it's our responsibility to make those requests in order that we do discharge our own responsibilities.

I want to assure you that all of the committee and the subcommittees of this Judiciary Committee, will be reviewing the various areas that are specifically and particularly under their concern. We hope that in this way we can resolve this question of authority, and resolve the question of what legislation we may be able to undertake.

I would first like to state, Mr. Attorney General, that we have been having some difficulty, No. 1, in dealing with this question of authorization. Last year the Department did not send up its authorization bill until May, which with our statutorily mandated reporting date of May 15 created extreme time constraints for the committee. As you know, it means that we have go to the floor and consider the question under a continuing resolution which really puts us under some difficulty.

I would like to ask the Attorney General when can we expect the Department's authorization bill for this fiscal year?

Mr. SMITH. Mr. Chairman, we anticipate having the bill up to you within 1 week or 10 days. We would expect to substantially meet the time schedule.

Chairman RODINO. Well, thank you. That would be helpful.

Mr. Attorney General, I sent a letter on February 24 to you requesting that you furnish several categories of relevant documents with relation to the EPA problem and the Justice Department's role. In response, you furnished me a number of documents which appear to be on the public record. The same thing happened again

on March 2 with a letter I wrote then with respect to the role of the Office of Legal Counsel. Ironically, one of the documents that you did furnish is a directive of the President stating that it is the "policy of this administration to comply with congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the executive branch."

Very frankly, I wonder whether or not the Justice Department has indeed complied even with the Presidential directive when it furnished those documents to me because in your responses you state categorically that while some relevant documents have been supplied, nonetheless, others have not been supplied.

Mr. SMITH. Well, Mr. Chairman, we think that we have supplied the documents to you that were requested and would be of value to the legislative oversight function of this committee. We heartily agree with the statement of the President that you just quoted. We certainly believe that we should make available to this committee and to the Congress all documents which it desires to have.

There are only certain areas where we have problems. These are not our problems. As a matter of fact, they are historical problems relating to the types of documents that normally are included within the definition of executive privilege, a term that is now bandied about so much.

However, insofar as we are concerned, with respect to the Office of Legal Counsel and the various papers that we have, I would certainly suggest that perhaps the best way to handle that would be for perhaps your staff, Alan Parker and Frank Polk, to get together with our people and see what papers there are that would be of value and appropriate to provide to the committee which you have not already received.

As I understand it, the principal documents, the ones that would be of value, have already been provided. If there are others, I would think perhaps the best way to handle that would be to have your and our staff get together and work it out.

Chairman RODINO. Well, I appreciate that, Mr. Attorney General, but I want to state for the record that my letter to you of February 24 specifically included this request, "Please supply all documents prepared by or in the possession of the Department in any way relating to the withholding of documents that congressional committees have subpenaed from the EPA," and I thought that frankly that request was pursuant to what I believe to be the right of a committee of the Congress that has to act in these matters and that the request was in line with what the Presidential directive was in supplying them.

Mr. SMITH. Well, when you use the term "in any way relating," that is an extraordinarily broad term and I'm talking now in terms of just plain practicality of what kind of documents do you look through, and where you draw the line relating to "in any way related to or relevant or helpful." Those are vague and ambiguous terms.

Chairman RODINO. Well, I appreciate that and I suggest we try to work that out. I'd like to ask initially before I ask other questions, will there be any limits on access to the documents?

Mr. SMITH. In terms of working with your people? I see no reason for there to be limits on that. Now, of course, I'm talking about this particular situation. I'm not talking about our basic position.

Chairman RODINO. I don't question your basic position. I mean, I'm talking about the documents.

Mr. SMITH. In this particular situation?

Chairman RODINO. That's correct.

Mr. SMITH. We don't see any reason why we shouldn't be able to work that out very nicely. We have done that before. We've always tried to do it and you can be sure—and I say this as a general proposition—that in those situations where we do not provide documents "we" being the Department of Justice—there is a very good reason for that, and the reason was arrived at only after very thoughtful consideration by very talented and able people.

In this particular situation, the original claim was based upon considerations which are exactly the same as the considerations that were undertaken throughout our 200-year history. The basis for our original position in this case was exactly the same, for example, as the position that was taken by Robert Jackson in his letter to Franklin Roosevelt.

Chairman RODINO. Well, I appreciate that, Mr. Attorney General. That's all recited in your letter and your responses.

Let me ask you something that will get down to specifics. Concerning the House's referral of contempt with respect to the EPA Administrator, the statute says that the Speaker shall refer the matter to the U.S. attorney "whose duty it shall be" to present the matter to a grand jury. The only precedent dealing with the U.S. attorney's duty of which we are aware suggests that this duty is mandatory.

Now that's what we've got. The *Franklin* case said so, and in dismissing the civil action against the House, Judge Smith said that "The President of the Senate or Speaker delivers the contempt citation to the appropriate United States Attorney, the United States Attorney is then required to bring the matter before the grand jury."

Now we asked about your interpretation of the statute in our February 24 letter and you did respond—frankly, I'm a little puzzled by it, but I did gather that you believe that as a constitutional matter the ultimate decision to prosecute under section 194 is yours. Is that a correct statement of your position?

Mr. SMITH. I think the law is quite well settled, Mr. Chairman, that prosecutorial discretion is lodged in the executive branch. It has to be and it has to be exercised there.

Now in terms of sections 192–194, those provisions can only be applied in the factual situation of a specific case. In this particular situation, I would say it's a little hard to talk about these things except in context. If we go back for the last 200 years in the history of this country, the issue that arose in this case has existed, during that 200 years in one way or another and the two branches of Government have resolved their disputes.

In this case, that dispute was resolved. It just so happens that in this case the proceedings went a little farther than they had gone in the previous cases. In previous cases they had been worked out one way or another. In this particular case, the contempt citation

was issued. The House took the unusual and unprecedented action of contempt against an official and that resulted in certain other actions being taken. Although those actions were taken, the dispute in this case ultimately was resolved and the Congress now has those documents.

Of course, in a very real sense, that makes the issue of the enforcement of the contempt citation moot.

Chairman RODINO. Don't you view a difference, though, between the responsibility under section 194 on the part of the U.S. attorney against a contempt citation as against a prosecutorial discretion document?

Mr. SMITH. Well, actually, you mentioned one case. The language dealing with what the Speaker is required to do in that section is also couched in mandatory terms and yet a decision with respect to that matter indicated that he did have a discretion to exercise it, despite that the language was couched in mandatory terms.

Chairman RODINO. But what will Congress then be able to do in order to be able to handle effectively their contempts when they issue them for contumacious acts?

Mr. SMITH. Well, Mr. Chairman, I think the Congress has done very well. They have the documents they wanted, as has been the result in the last 200 years. The only difference being here that we took some steps that previously hadn't been taken.

Chairman RODINO. Well, you must admit, Mr. Attorney General, that the steps that were taken followed only a lot of wrangling and a lot of publicity and a lot of questions that were arising in the minds of many people, and then some action was taken to try to resolve the disagreements.

What I'm talking about is the law and I'm talking about how do we treat this in the future so that these various problems don't arise to confound us, and I say that the Justice Department can't alone make this decision.

Mr. SMITH. Well, I rather suspect, Mr. Chairman, that previous issues of this kind have also created a fair amount of wrangling and controversy and discourse and discussion. I think that it's unfortunate that it had to happen, but I think that probably we have a built-in and continuing, conflict in essence, between the two branches when it comes to where you draw the line on these documents. I think it is just in the nature of our system that this conflict and controversy and tension, if you want to call it that exists. It is inherent and I think we just have to deal with it as it arises on each specific occasion. We dealt with it here. As I say, the only difference between how it was handled here and how it has been handled in the past is that steps that had not previously been taken were taken in this case.

I guess I'm saying that as long as we have this system of Government, I don't see how we can eliminate the kind of problem that arose here. We dealt with it in the past. The first issue of this kind arose with Henry Randolph, the first Attorney General under President Washington. I mentioned the opinion that Attorney General Robert Jackson gave to President Franklin Delano Roosevelt. It was almost verbatim to the opinion which we gave in this case. I'm sure involving entirely different circumstances, entirely different situations, but nevertheless, that is the kind of controversy

that our system generates and I think it's incumbent upon you and it's incumbent upon me to be responsible when we come to grips with those problems and work them out as best we can.

In this case, unfortunately, it did go farther than it should have, but that is part of the process. Now this issue, needless to say, is separate and apart from issues involving EPA management. This has to do with a traditional area where you have to draw the line between what Congress wants and what we in the executive branch feel, for very good reasons, that we cannot give.

Chairman RODINO. I'm sure that there are going to be other members that are going to pursue that further. I know that my time is up. I'm going to ask one further question and that has to do with the Barbie case.

Mr. Attorney General, on February 24, I wrote suggesting that the Office of Special Investigations in the Justice Department be authorized to investigate serious allegations regarding Nazi war criminal Franz Barbie. This has not been a matter that we just touched on. This has been an ongoing matter, a matter of great concern previous to your administration, as far back as 1974. Very frankly, we found the Justice Department has been less than forthcoming at least in cooperating with the requests that we have made which we felt were justified because of the various testimony that was brought to our attention and a lot of evidence that seems to suggest that there's something amiss here and, that indeed, the Justice Department should have investigated it.

On March 4, I wrote a second letter reiterating my concern and requesting certain information on Barbie's alleged entry into this country. Last night I received a letter from Assistant Attorney General McConnell responding preliminarily to my letter. Press reports this morning indicate that you have adopted the suggestion which I made that the Department through the Office of Special Investigation on Immigration investigate this matter.

Can you advise me at this time what, if anything, the Justice Department is going to do in this area? I think it's an area that really merits the attention of the Department and especially that special division that is assigned responsibility in this type of case.

Mr. SMITH. Well, Mr. Chairman, you may know, last night we announced that we were undertaking a full investigation of this matter.

Chairman RODINO. The reason why I mentioned it, Mr. Attorney General—pardon my interrupting—is because I had written and had been writing and had been requesting reports from other agencies, on this matter I read in the news accounts of a few days ago that the Justice Department up until that time had, found that this was a matter that might have been of historical importance only and so it wasn't going to investigate it. In the meantime, we were trying to bring this to your attention.

Now I'd like to get straightened out on how we go about this and what we can expect.

Mr. SMITH. Well, Mr. Chairman, you made the mistake of believing what you read in the newspapers.

Chairman RODINO. I don't necessarily believe it. I called it to your attention.

Mr. SMITH. We have made no decision on that. However, we did have a look at it because from the standpoint of the Justice Department we had to do something in that area. For example, we had to review with the Office of Special Investigations, which incidentally I think has done a fine job over the years, as to whether or not such an investigation would be likely to yield anything of significance or value to them in connection with their work. That required a fair amount of investigation and checking and review.

Also, we had to review the question of whether or not this was a matter which as far as our activities were concerned might result in some kind of prosecutive action on our part.

It is true that it is not our essential function just to engage in investigations of historical value. What we do we have to do with a purpose that is within our mandate and within our jurisdiction.

As a result of that review—and these reviews do take time, particularly in a matter of this kind—we have determined that this is something that we should look into and last night we announced that.

I recognize that our action probably didn't quite fit into the time sequence rhythm of your correspondence but that was really quite coincidental. In any case, we are going to do it.

Chairman RODINO. Well, I want to thank you very much and, as I say, I brought this up because this has been a matter that we've been dealing with since 1974. This man is alleged to be an arms smuggler and having been given assistance by some agencies of the Government here. I think these are matters of deep concern, especially when it has been known that this man is a Nazi war criminal. I certainly believe that it's incumbent on us to really review this matter carefully and to complete it. I thank you very much.

Mr. SMITH. Well, we agree.

Chairman RODINO. Mr. Fish.

Mr. FISH. Thank you, Mr. Chairman.

Mr. Attorney General, if I could address just a few words on this question of statutory duty, I agree with you that this issue has been before us and our descendants for a long time and basically I see the conflict here as between the Constitution and the statute, and I suggest it's your constitutional responsibility to see the law is faithfully executed. We have statutes that direct EPA to prosecute polluters and in furtherance of this there are memorandums of evaluations of weaknesses of cases and weaknesses of witnesses in the so-called enforcement sensitive documents that should quite correctly concern you.

On the other hand, title II, section 192–194, United States Code sets forth a statutory duty, that is to take the contempt case to the grand jury. Thus, it seems to me you're faced with a conflict between constitutional duty to enforce the laws and the statutory duty, and not only is this conflict one for which the Department of Justice should not be held responsible, but it is clear that you owe a higher obligation to obey the Constitution, as you did in this case.

Anyway, the duty under section 194 was resolved we hope in the February 18 agreement. It is my hope, Mr. Attorney General, today that we can have an amicable resolution of the role of your Office of Legal Counsel and the documents sought by this committee along the lines that you suggest without our recreating the execu-

tive privilege issue, and I'm quite confident we can work things out.

I share the chairman's strong feelings about the issue of Nazi war criminals in America and those with ties with American Government agencies, and I joined with several other Members of Congress recently in writing the President also requesting that he direct your Department to investigate the Barbie matter, and I welcome the assurance we have that you are in fact going to conduct such an investigation.

On a related subject, can you assure this committee that the Office of Special Investigations will continue to be given full funding and staffing that it needs to prosecute those war criminals who have found sanctuary in the United States?

Mr. SMITH. As I mentioned to the chairman, we think that the Office has really done a fine job in its day-to-day activities. Certainly, this particular matter has been assigned to that Office and I'm sure, based upon their performance in the past, that they will perform credibly here.

In terms of funding, of course, that is certainly included in our budget request.

Mr. FISH. I'm pleased to hear that.

Now I would like to turn to some of the elements of the authorization. In the field of antitrust, Mr. Attorney General, what has been the role of the Department in formulating administration policy on maritime legislation? Do you see procompetitive merit in eliminating the requirement that shipping tariffs be filed with the Federal Maritime Commission and subject to that Commission's enforcement? Shouldn't the Government get out of the business of enforcing price-fixing arrangements of ocean carriers?

Mr. SMITH. Well, that area is a very, very complicated area and it brings into play the overall issue of free competition versus things as they are. This is an area where we have been very definitely involved.

The Assistant Attorney General in charge of antitrust has certainly been a strong advocate of free competition and has been very much involved in those discussions.

There's no doubt that the decisions that are made in that area have to take into account the practicalities as well as the basic philosophy. We think that that is being done.

Mr. FISH. Mr. Attorney General, you recall last month this committee reported out the Bankruptcy Court Act requiring staggering appointments of constitutional bankruptcy judges over a 3-year period.

My question is, do you believe that this will lead to constitutional risks and uncertainties in bankruptcy adjudication and how promptly is the Justice Department prepared to move if the bill is amended to authorize the President to make all bankruptcy court appointments immediately?

Mr. SMITH. Well, we certainly would urge that action be taken in this area. There's no question about the fact that it is critical to the judicial system and the dispute resolution process that Congress act and act quickly insofar as curing the problem created by the Supreme Court decision. Certainly, we would prefer to have that solution handled as quickly and expeditiously as possible and

whatever the solution is involving appointments, we think that should be done as quickly as possible as well.

Mr. FISH. And you think the Justice Department is prepared to move promptly if the President makes the appointments?

Mr. SMITH. We are ready to move as soon as the ink is dry.

Mr. FISH. Thank you very much, Mr. Attorney General.

Chairman RODINO. Thank you. Mr. Kastenmeier.

Mr. KASTENMEIER. Thank you, Mr. Chairman.

It's a pleasure to welcome the Attorney General.

The chairman's interest in how soon the budget of the Department of Justice authorization will come down is important. I think looking ahead, however, we should also be aware of the other problems confronting that authorization in the last Congress and I hope the Attorney General of the Justice Department would in due course caution the Senate against adding major extraneous subject matter to the Justice Department authorization. That frustrated ultimate enactment in 1982 of the authorization and hopefully this year we can avoid that pitfall.

While the Justice Department was not responsible for it, I think they can play a major role in obviating that problem with this Congress.

Mr. SMITH. I think you may be giving us a little more credit than we're entitled to, but we would certainly like to do that. I think our influence may be significantly less than you indicate.

Mr. KASTENMEIER. Well, I'd like to also compliment your Department—I don't know that you had very much choice, but you proceeded under the Civil Rights for Institutionalized Persons Act just recently in the Hawaiian case. There are really two cases that you have now taken to court and apparently not been able to reach any adjustments of the problems in Hawaii with State officials and you're pursuing the act as it was intended and I do want to compliment you for it.

Mr. SMITH. Thank you.

Mr. KASTENMEIER. I have a couple questions actually in an area unrelated to your Department but in which you may have a view.

It's expected very shortly that the president of the Legal Services Corporation will come before my subcommittee and request $257 million for another year's authorization for that operation. Having been authorized $241 million last year, I wonder whether you have any view concerning that, whether you have any reservations about President Bogard's request in that regard?

Mr. SMITH. Well, we really don't have a view because of it's been customary with respect to the Legal Services activity for the Department of Justice to remain independent. I think the genesis of that independence has to do with the potential conflict of interest because we are frequently sued by Legal Services. That appears to be the original rationale as to why that budget is not a part of the Department of Justice budget, and therefore, we have pretty much stayed out of that area.

Mr. KASTENMEIER. Another area. On May 6 of last year, you wrote the chairman of the Senate Judiciary Committee that, referring to court legislation:

Congress may not consistent with the constitution make exceptions to Supreme Court jurisdiction which would intrude upon the core functions of the Supreme Court as an independent and equal branch in our system of separation of powers.

Just last week, Senator Helms introduced S. 784 which clearly and unequivocably precludes judicial review of school prayer cases by the Supreme Court.

Is such a bill constitutional, in your view?

Mr. SMITH. Congressman Kastenmeier, I really couldn't answer that question because I have not seen the bill. I'm not sure that I would even if I had seen the bill, for the reason that Congress also has a determination to make with respect to constitutionality. It's often assumed that the only branch of Government that makes decisions with respect to constitutionality is the Supreme Court, which of course is not the case. The Congress also has to make that determination. The Executive has to make that determination in given situations as well as the Court. And as I indicated in the letter to which you refer, in given situations before we would come to a conclusion we would want to see what Congress did, what the legislative history was, what its constitutional determination was and so on.

So I really wouldn't be able to answer that question with respect to that specific bill. However, I would say—to the extent that one can in a field such as this—we do lay out what we consider to be the important considerations and then we go on to say, that quite aside from the constitutional question, as a matter of policy, we have certain views on that subject. They are enunciated toward the end of that letter.

Mr. KASTENMEIER. Well, I think your letter is quite explicit on that question but, nonetheless, I hope in due course you will communicate your views not only to the Senate Judiciary Committee but also to the House Judiciary Committee since we too will probably be confronting that issue.

One last question and this is a followup to the chairman's question and that is on the so-called EPA case—and it goes to just one question, a collateral question.

For example, recently U.S. attorneys in Miami did decide to prosecute a U.S. marshal and that, we understand, was cleared by your office for prosecution. In the ABSCAM case, it's somewhat less clear, but it does appear that in cases of Members of Congress and other high-ranking officials these were cleared by the Justice Deent for prosecutions.

I'm wondering, in the matter of that U.S. Attorney Harris proceeding against Mrs. Gorsuch Burford, is there a clear, coherent policy of the Justice Department whether or not a U.S. attorney in notorious cases clears a prosecution; in other words, gains guidance from the Justice Department with respect to proceeding with the prosecution? Is there some coherent policy that presently exists with respect to that?

Mr. SMITH. Well, I don't know whether it rises to the dignity of a policy, but it's certainly a practice; and that is that the U.S. attorneys will make these decisions themselves. Then, if they have any question about it or if we have any question about it, it would be reviewed. But it is the U.S. attorney who makes that decision, that

determination in the first instance, and in the ordinary case he would implement it and carry it out.

If he has any particular concern or if we have any particular concern, then of course we would discuss it. But he makes the decision in the first place.

Mr. KASTENMEIER. Then we're left with a totally ad hoc proposition that only if the U.S. attorney has a concern or if the Justice Department, notwithstanding the U.S. attorney—whether the Justice Department has a concern—will that matter be reviewed by the Justice Department?

Mr. SMITH. As a general practice, I think that's correct.

Mr. KASTENMEIER. And neither of those elements apparently existed in the Burford case?

Mr. SMITH. Well, in that case, we certainly had a concern, as we all did. However, we were satisfied that what the U.S. attorney was doing there was the proper action so we had no occasion to do anything.

Mr. KASTENMEIER. I thank the Attorney General.

Mr. Chairman, I yield back my time.

Chairman RODINO. Mr. Moorhead.

Mr. MOORHEAD. I join the others in welcoming you here today, Mr. Attorney General, and I appreciate the comments that you have made so far. I'm interested in some questions about the bankruptcy courts and legislation we're considering in that area.

In 1978 the Bankruptcy Act created the U.S. Trustees on a trial basis. What is your view in regard to the continued use of these trustees and if they remain in existence should they remain under the Department of Justice?

Mr. SMITH. Well, we are proposing at this time that the U.S. Trustees continue to be funded until the legislation that created them sunsets, which is in April 1984. In the past, as you know, we have thought that this was an appropriate function to be under the judiciary rather than the Department of Justice, and as a result, we have proposed the elimination in whole or in part of the U.S. Trustees.

However, in view of that fact that the experimental period terminates in April 1984, we are proposing that they be funded for that period. Presumably then the question will be thoroughly discussed and debated in Congress and whatever happens there will happen.

Mr. MOORHEAD. H.R. 3, which would provide for more bankruptcy judges, has been reported out of this committee and soon will be scheduled to come before the Rules Committee. There's been a great debate on the need for these judges and there's been some attempt to put off the appointment of the judges presumably until after the next election.

What is your position on the need for these judges now?

Mr. SMITH. Well, as I mentioned earlier, we think that that bankruptcy situation has to be taken care of and has to be taken care of as soon as possible and that we would include within that the appointment of whatever judges are determined to be appropriate in that solution. We don't see any reason to wait. We think it should be done as soon as possible.

I think the figures indicate that there are at any one time probably about 700,000 cases pending, most of them of course routine

but a good many not so routine. We think the current uncertainty that exists has to be eliminated and Congress is the only one that can do that.

Mr. MOORHEAD. How do you feel about the flexibility issue?

Mr. SMITH. As you know, we have supported the judicial conference approach which would provide for bankruptcy magistrates as well as additional Federal district court judges to handle the additional burden. They would be fundable under that proposal, and we are supporting that approach, although we are certainly not confined to that. We certainly would be very pleased to work with either representatives of the Senate or the House to put together a proposal that would be satisfactory all around.

Mr. MOORHEAD. Last year we spent a lot of time the last 2 days of the session on a bill dealing with immigration reform and control. I know the administration is supporting this legislation very strongly, but there seems to be a certain drag on it and it's been very difficult to get through the House. I think we had a hundred-some-odd amendments that were pending before the Committee of the Whole House before we finally terminated last year. We began a little earlier this year with this bill and we hope to get some kind of a solution out. But in view of the uncertainty, isn't it prudent to avoid putting all of our eggs in one basket and instead, proceed simultaneously with efforts to beef up enforcement and get a little stronger enforcement on the borders?

Mr. SMITH. Well, we certainly agree. We think it is important to get an immigration bill out and get it out as soon as possible. It happens to be legislation that is in the long-term public interest, but cuts across a host of short-term particular interests; and that, of course, makes it quite difficult because there are so many facets to it. An objection to one aspect very often will affect the attitude toward the whole program.

We think what came out of the Senate last year represented a very good balance and one that we certainly heartily support. I know the chairman has been playing a very active role in doing something in this area and we want to work with him and Congressman Mazzoli as well. I think in the long term this is one of the most important pieces of legislation the Congress will be dealing with this year and we certainly hope and urge that every effort be made to pass it.

Mr. MOORHEAD. Thank you very much.

Chairman RODINO. Mr. Edwards.

Mr. EDWARDS. Thank you, Mr. Chairman.

Mr. Attorney General, the FBI has a communication system that connects every police department in the country and radio cars of the police with a data bank in Washington, D.C., and that is called the NCIC, as you know. The information in the NCIC has always been public information, such as outstanding warrants, stolen property, missing persons. Now you have agreed with the Secret Service that the names of people who might commit a crime, who might be a danger to the President or one of the protectees, shall be included in the NCIC. In other words, a national surveillance system of a certain group of people who might commit a crime.

Does that bother you at all that this NCIC system is going to be used as a national surveillance system?

Mr. SMITH. Congressman Edwards, there's always just a matter of balancing interests and concerns with meeting problems. As you know, the FBI was criticized—I don't think properly but nevertheless, it was criticized at the time of the attempted assassination of the President for not having made available information to those who needed it, namely the Secret Service, particularly of a very small group of people who were to be known risks, at least to be suspected risks. This is an effort to cure that situation so that it doesn't happen again. There are efforts to keep that list small and focused to avoid any problems such as the ones that you are alluding to and we think that this accomplishes the proper balance.

Mr. EDWARDS. Well, thank you. The FBI was criticized unfairly because none of the names—for example, Mr. Hinckley's name would have been in the system anyway and we understand that. However, if you're going to open up this system to people who might commit a crime some day, people who might be a danger to the protectees of the Secret Service, wouldn't you have an equal responsibility to put in the names of suspected saboteurs or known terrorists or known Russian spies? Wouldn't it be in our national interest to know where they are at all times?

Mr. SMITH. Well, we do the best we can in that respect. However, I certainly agree that this kind of activity has to be handled with care and it has to be done in full recognition of the problems that concern you and all of us. We certainly want to do that and have every intention of doing it. I do think there's a specific need and that doing what has been done here with proper reference to the problems that you're concerned with can be done. At the same time, we will strive toward accomplishing the goals that we think we in law enforcement have to protect.

Mr. EDWARDS. Thank you. Then would you work with us so it would be a matter of law rather than a matter of discretion by future Attorneys General who might expand the system so that it would include hundreds of thousands of names—there's no limitation under the present order——

Mr. SMITH. There is one limitation, and that is resources.

Mr. EDWARDS. Don't you think it ought to be a matter of law rather than a discretion?

Mr. SMITH. I don't think I can answer that question at this point. I would have to review the pluses and minuses of that. I don't think I can give you an immediate answer. My reaction is that probably this is an administrative matter and not a matter of legislation, but I'm not sure of that.

Mr. EDWARDS. Thank you. Mr. Attorney General, my last question has to do with the Presidential directive on March 11 authorizing the administering of polygraph tests to employees with access to classified information. The CIA, NSA, and the Pentagon have used polygraph tests for quite a while. Last year the General Accounting Office reviewed Pentagon investigations into unauthorized disclosure of classified information and found out that even where polygraph tests were administered, no individual has ever been fired or removed from a position of trust.

Do you have any information as to whether polygraph tests are going to do any good at all or as to whether—has anybody ever lost

his or her job because of the polygraph test in the Federal establishhment?

Mr. SMITH. Well, Congressman Edwards, I can't answer the question as to whether or not anybody has ever been fired. I don't know. I do know that nobody has ever been convicted of a crime because of a leak. This is an effort really to get at a very, very severe problem, one that has and continues to affect national security in a very significant way. We think that the President's action in this case is quite proper.

Whether or not it will achieve the ultimate goal, we don't know. At least, it does suggest a new approach, namely the use of administrative approaches rather than criminal approaches. I don't know whether that will result in terminations or discharge or even the simplest reprimand, such as removing classified status. What is done here is not new. It is merely an extension of what is already being done in certain areas, including the Department of Justice. How and whether it works, we'll just have to see.

Mr. EDWARDS. Thank you. My time has expired.

Chairman RODINO. Mr. Hyde.

Mr. HYDE. Thank you, Mr. Chairman.

Mr. Smith, your Department has recently been the subject of some very serious charges and I'd like to explore that with you for a moment.

The distinguished senior Senator, former chairman of the Judiciary Committee in the other body, referred to your agency as follows:

> The book burners of the 1950's have become the film blacklisters of the 1980's. The Attorney General has dropped his own iron curtain across the movie screens of America.

The same gentleman whose whole life has been a hymn to the notion that there are two sides to every story and a man is innocent until proven guilty, also said that making Reagan into Reagan is bad enough.

Now these remarks, which of course implies Big Brother is watching you, certainly if there's anybody sensitive to Big Brother watching anybody, it would be the distinguished senior Senator from Massachusetts. Now I can't believe a man so sensitive to fair play would make a charge that was without basis without at least calling you to find out what the other side is. Of course, it gets worse.

We have the leading newspaper in America—in fact, the planet—the New York Times said that your Department had shamed American democracy. Now surely they don't write such things without picking up the phone and asking what the facts are, what the truth is.

One of the leading political columnists, a most inciteful columnist I've ever encountered, Mr. Lewis, said what you did was outrageous and unconstitutional.

You're quite a fellow, Mr. Smith. Now we have another group that absolutely bleeds for civil rights that would never make a charge without knowing what it's talking about because they've got lawyers sitting on top of lawyers over there; the American Civil Rights Union asked the question, "What country is this? What

decade?" I'm sorry. That was the Washington Post that said that. Outrageous and unconstitutional is what the American Civil Liberties Union said.

Now all of these people, distinguished civil libertarians all, making these charges against your Department makes me feel embarrassed to be a Republican.

The U.S. News & World Report, however—I don't know where they get their information—says:

> Justice Department officials are complaining that the makers of three Canadian movies on acid rain and nuclear arms cleverly conned the news media into promoting their films by contending they were forced to label the films as political propaganda. Federal lawyers said they simply required notice that the movies were made by registered foreign agents, just as they had done without fanfare for 23 other films over the last 2 years.

Now I have also learned that there were dozens of films so labeled in the 1960's and 1970's, including "Conversation with Golda Meir" from Israel; "African Powerhouse" from South Africa; "Trade: Who Needs It?" from Japan—that I want to see myself—and "Plight of Freedom" from South Korea.

Now, Mr. Attorney General, what's your response to this distinguished group of freedom fighters lowering the boom on your film blacklisting?

Mr. SMITH. Congressman Hyde, I think you have said it far better than I could say it.

I can't remember who it was, but somebody said that that whole situation was a demagog's delight, and that's exactly what it turned out to be, and you can tell who are the outstanding demagogs by how they reacted to that particular situation.

I will say I think it is certainly an unhappy commentary on the press that they could—and that includes the national networks as well as the print media—that they could be so taken in by a story such as this when finding out what the true facts were was so easy. But it all had the makings of a great piece of fiction and that's exactly what happened.

Mr. HYDE. Was there a power outage on the telephone system that made it impossible to just verify what the facts were? Did none of these agencies bother to call you?

Mr. SMITH. The facts were put out by the Department of Justice the day after the story broke, in depth. So nobody can say that they didn't have access to the facts.

Mr. HYDE. Have any of these first amendment defenders of people's right to know apologized for their characterization of you as second to Adolph Hitler or Joe McCarthy in censoring these marvelous, entertaining, illuminating films?

Mr. SMITH. I haven't received any word of apology from anybody except I thought that Jody Powell wrote a very good piece and I thought that was outstanding because it's one of the few instances where I've seen somebody in the press who had made a mistake admitted it.

Mr. HYDE. I'm so sorry my time is up. Thank you.

Chairman RODINO. Mr. Seiberling.

Mr. SEIBERLING. Thank you.

Mr. Attorney General, I'd like to ask you to go back to the question of the Gorsuch subpena. There are so many questions it's hard to know where to begin, but let me start this way.

Did the President himself view the documents that were withheld in the EPA controversy and did he instruct EPA not to turn them over to the Congress?

Mr. SMITH. I don't know the answer to that question, but I would be very surprised if he had.

Mr. SEIBERLING. Well, the Department of Justice's statement at the time the administration filed suit against the House of Representatives states, "After careful review, President Reagan found that the withheld documents are from open law enforcement files." Doesn't that suggest that he himself examined the documents?

Mr. SMITH. No, sir.

Mr. SEIBERLING. Do you know who wrote this statement for the Department?

Mr. SMITH. No; I don't.

Mr. SEIBERLING. Mr. Attorney General, press accounts suggest that it was the Department of Justice and not the EPA that demanded that the documents be withheld and that the President reportedly stated that EPA Administrator Burford wanted to turn over the documents. Now are these accounts inaccurate to your knowledge?

Mr. SMITH. Well, I think it's certainly correct to say that the President has said in his statement, to which the chairman referred, that we all—the President and, certainly, the Department of Justice and, I'm sure, EPA—want to turn over as much information to the Congress as we can and there's no doubt about the fact that it is a part of our function to do just exactly that, particularly to our oversight committees. But there comes a time when you get into certain categories of documents where in the view of the Executive, again for 200 years, those documents are not appropriate to be released.

Mr. SEIBERLING. But you're not responding to my question, Mr. Attorney General. My question is very simple. Was it the Department of Justice and not the EPA that decided the documents should be withheld?

Mr. SMITH. Well, I'm just—my answer is responsive to that question, Mr. Congressman. I'm saying that we both wanted to release as many documents as possible. When documents fall into this particular category, it's incumbent upon us to take the position we took and at the time we took that I'm sure that, so far as I know, at least, everybody concurred in that action.

Mr. SEIBERLING. Well, the Department was involved in that decision then?

Mr. SMITH. It certainly was.

Mr. SEIBERLING. Did the Department ever advise EPA that it must or should withhold the documents, rather than merely advise EPA as to the legal rights to withhold?

Mr. SMITH. I'm not sure I understand that distinction.

Mr. SEIBERLING. The distinction is whether you gave advice as a matter of law, or as to what should be done as a matter of policy.

Mr. SMITH. If you're asking who made the decision——

Mr. SEIBERLING. I was more or less asking whether you were involved yourself or whether the Department involved itself as a legal counselor or as a policy counsel.

Never mind; let's go on to another question. We now have a situation where the President, according to the Department, decided the documents should not be turned over, and then we have a statement by you that the U.S. attorney made this decision on his own. I find that your statement is inherently astounding because either it indicates that there is no coordination by the Department or it, in effect, flies in the face of an assertion that the President has decided the documents should not be turned over. Of course, the law says, and I quote:

> That where the Speaker certified action of the House to the appropriate United States Attorney, that United States Attorney, whose duty it shall be to bring the matter before the grand jury for its action.

Despite all of these consultations and deliberations, the U.S. attorney just went on his own. Is that what you're telling us?

Mr. SMITH. No; we didn't say that at all.

Mr. SEIBERLING. Well, you said it was his decision. And you're here to back him up.

Mr. SMITH. I said, what he did was his decision. And what he did, did not, or what he said at that point was his decision. We were very satisfied with his determination as to the course of action he should follow.

Mr. SEIBERLING. He didn't consult with you or the Assistant Attorney General before he made his decision?

Mr. SMITH. He did not consult with me. I understand that on that particular issue, he did not consult with any of our people. But of course, he was in consultation with our people in connection with the civil suit and related matters.

Mr. SEIBERLING. Wasn't the decision to bring a civil case tantamount to a decision not to bring a criminal case?

Mr. SMITH. Not necessarily. There are other considerations that are involved there, including constitutional considerations.

Chairman RODINO. The time of the gentleman has expired.

Mr. SEIBERLING. Mr. Attorney General, I am even more baffled now than I was before.

Mr. SMITH. It's pretty important to understand what the basic issues are in this matter.

Chairman RODINO. The gentleman from Ohio.

Mr. SEIBERLING. I certainly don't.

Mr. KINDNESS. Thank you, Mr. Chairman.

Attorney General Smith, welcome to the committee.

I would like to note that the Subcommittee on Government Operations recently held hearings in Miami, Fla., concerning the Central Florida Task Force and its effect upon the drug traffic in that part of the country. I believe some question was raised as to the commitment of the administration, really with respect to the South Florida Task Force, not only the South Florida Task Force, but the 12 new task forces organized with respect to organized crime and drug trafficking throughout the country.

It appears to me that the hearings to which I refer indicated in their content quite a bit of progress having been made by the

South Florida Task Force and the almost unheard of degree of cooperation between a great many agencies.

I would like to ask whether you, on behalf of the Department of Justice or the administration, have any statements to make at this time with respect to modification or extension of the administration's position with regard to the South Florida Task Force, first, as to the commitment to continue that effort.

Mr. SMITH. Well, I really can't place much credibility in the statement of the administration's lack of commitment to the drug enforcement area. Whoever is making that statement just doesn't know what he is talking about and has indicated no other reason behind it. The President's antidrug traffic initiative, announced last October, involves some $127 million in new money and, of course, when we are up to full strength, will involve some 1,600 additional law enforcement personnel.

As far as what is going on in south Florida, the successes there have been recognized by everyone, including the press there and local officials. Just yesterday, I was talking to the attorney general in Florida who, once again, commented about the success of that effort and how important it was to south Florida, because south Florida had reached a point where, without that kind of effort, they would have been overwhelmed.

I know an effort has been made to suggest a minimal commitment by the administration on this issue, and so on. But anybody who is advancing that is doing it for political purposes and not substantive purposes.

Mr. KINDNESS. There has been no change in the position of the administration to be announced at this time, I take it?

Mr. SMITH. None whatsoever. As a matter of fact, we are full speed ahead in that area.

Mr. KINDNESS. With regard to the 12 task forces, could you describe the status of that matter at this time?

Mr. SMITH. Yes; all 12 task force core cities have been designated, and each task force has been put together. There is no such thing as an average task force. Each task force is structured to address the needs of the area and the seriousness of the problem, and so forth. On the average, we have about 20 investigators, 4 or 5 prosecutors at this time in each city and cases have been selected and assigned to each one of those.

None of the task forces will be up to full strength until about summer, which is about as quickly as you can put these groups together. The effort does involve new people, training, organization, and so on. By summer, they should be up to full strength and full strength means, as I just indicated, some 1,600 people, plus or minus, including investigators, prosecutors, and support people.

Mr. KINDNESS. Would you describe that as being pretty much on schedule?

Mr. SMITH. It's right on schedule. Not only right on schedule, but we believe it's quite an accomplishment, since the bill authorizing this effort was only signed on December 20, 1982.

Mr. KINDNESS. Another part of the administration's position in this quarter was announced last October, which was the desirability of establishing an advisory commission with varied member-

ship, and money for that was not included in the appropriation measure by the Congress.

Has the administration's position modified with respect to that advisory commission, or is that still being requested in 1984?

Mr. SMITH. No; that's going ahead, and it's not really an advisory commission. It is a commission on organized crime. Its function is to highlight and to look into the overall subject of organized crime with some flavor of the old Kefauver committee which, of course, performed quite a service in this area. The membership of the committee will be announced before too long.

Chairman RODINO. The gentleman's time has expired. Mr. Mazzoli.

Mr. MAZZOLI. Thank you very much. Thank you very much, Mr. Chairman and Mr. Attorney General.

Let me, in my 5 minutes, first thank you very much for your ardent support of the Immigration Reform Act. I think you seldom have a public forum where you don't mention the legislation and I appreciate that. I think the people of America appreciate it because it is an important, although incomplete, part of our agenda.

Let me say that I think in your time as Attorney General you have done much to improve the status of the Immigration Service. I think that the current Commissioner has done much in his short time there to improve the Service's ability to handle its many tasks. But I'm sorry to say in looking at the budget which is proposed here for 1984, I am very disappointed that there is not more money in the budget for the Immigration Service.

Without trying to overwhelm anybody with data, the Border Patrol is to receive the same level of funding in 1984 as it received in 1983. We know that the number of apprehensions on the southern border has increased dramatically. The funding level for curbing smuggling, which everyone realizes is one of the most important aspects of controlling illegal entry, is virtually the same in 1984 as it was in 1983. There are hardly any new investigators going out into the community to find out who is here legally and who is not. Again, the funding level is the same.

With regards to citizenship benefits, naturalization takes as long as 2 years. Many of my colleagues write to you and write to me and say, "Why does it take so long for a person to become an American citizen once that person has served out his or her time as a resident?" And yet, the funding level for 1984 is basically the same as for 1983.

Do you believe that this 1984 budget that you present today realistically deals with the problems we face in immigration control and immigration reform?

Mr. SMITH. Well, we would always like additional resources for everything. I do think sometimes we do things better with what we have when we are pressed. However, I do recognize the problem with respect to the Border Patrol. However, that area did receive a significant amount of attention in the 1982 budget. At that time, you may recall it was one of the few areas excluded from the freeze. Also, in that budget, we restored a number of positions that initially has not been requested by the President of which a significant number were Border Patrol. This year we are requesting an additional $44 million, a large part of which will be going toward

the technical development which, in effect, will also aid the border situation.

It's a difficult problem, and of course, there are additional items in there to deal with, such as the Olympic situation. We're also opening a new Border Patrol point with an additional amount to take care of that.

Mr. MAZZOLI. Mr. Attorney General, without taking the data from my friend from Texas which he presented to you when you appeared before the Immigration Subcommittee the other day, we all know that if you put all your people on duty from the Pacific Ocean to Texas, you will have only one person every 12 miles or so. I know that people don't cross in all these areas. Within this region there are flat deserts and some terrible areas. And I realize we can't wave a magic wand and hire another 2,000 people and deploy them accurately and efficiently. It takes time to train them, but I believe the facility at Glynco, Ga., can provide training for some 400 people a year, and the INS Border Patrol can be absorbing them.

It's my position to urge my subcommittee and this full committee to provide some additional funds to those areas. I believe that our data shows there could be as many as 1,500 positions added quickly, and as much as $58 million added which could be effectively and efficiently spent.

Subject to the activities of my colleagues here, we may be adding that to this budget.

I have one last question, Mr. Attorney General, before my yellow light comes on. The immigration reform bill will be coming before committee and the Congress this year. One of the complaints and concerns of my colleagues is whether the administration is really serious about seeking adequate funding to implement the Simpson-Mazzoli bill.

Do you believe a supplemental request is an effective way to answer that criticism?

Mr. SMITH. Actually, I think I can answer both of those comments. I'll state the last first. We would, in the event this program passes—and if it passes in time—we would ask for a supplemental for 1983. If it doesn't pass in time, then we would have a budget amendment for 1984. In either case, we certainly would ask for funding for the enforcement effort.

And as part of that enforcement effort, to answer the first part of your question, we would also contemplate there would be funds in there for additional Border Patrol positions, and perhaps a significant number. And I think perhaps that might be one place to solve that Border Patrol problem.

Mr. MAZZOLI. My time has expired. My last statement, Mr. Chairman, with your indulgence is that I appreciate your comment, but I think it may put the cart before the horse. I think we need to think in terms of the implementation of the immigration reform bill. Some general figures we have would indicate it would cost over $100 million to do it right. We may come back with that money.

I thank you, Mr. Chairman, and thank you, Mr. Attorney General.

Chairman RODINO. Mr. Sawyer.

Mr. SAWYER. Thank you, Mr. Chairman.

Just to follow up on that point, I do notice Mr. Mazzoli is reflecting objections of myself and Mr. Hughes from New Jersey, who are both concerned.

We want to support the immigration bill, and we know something has to be done.

But we have both had the concern that we are, in effect, doing all this great legalization, but leaving our border and our documentary control of our visas and everything as virtually a sieve that will suck in a whole new problem about as fast as we cure it.

So, I know a part of inclusion of funds in Mazzoli-Simpson are due to known objections of Mr. Hughes and myself.

And at least as to me, I want to support the bill. And if that's done, I am prepared to.

But I would urge that some consideration be given to what Mr. Mazzoli has said, that doing it in a later thing is going to be kind of putting the cart after the horse. And in order to get the cart rolling, maybe the horse has to be there so at least we are sure we're not creating a vacuum within a sieve.

I want to congratulate you on having at least brought back the INS to some degree.

Under prior administrations, they eliminated some 400 positions. And at least we are now back to the 1978 strength, which isn't great, but I would just urge you to give some serious consideration.

It's also a very politically controversial bill, as you may know—not just political but, objectively, some of us are concerned about its not being done the right way.

And I'm sure that would greatly simplify Ron's problem with it. And I'd like to do that, too, if we can.

So, I would certainly urge that you—you know, right now they keep these visas down there in shoe boxes, and they have no idea what they are. They're not data processed.

And you may recall, back during the concern about the hostage crisis, about how many Iranians we had in the country, and they first said, "Oh, 36,000 Iranian students." And then, about a week later, corrected it to 78,000. The fact is, they had no idea.

And it's not just a border problem. It's a problem controlling the incoming and outgoing. And not even the data processing can solve that.

It's surely horrible. We're going to have to take a big step.

So, I just urge you to give some consideration to that.

There is some merit to what Ron was saying. The legislation is going to have its problems. And otherwise, some of us would support it.

Mr. SMITH. Congressman Sawyer, I sympathize with your comments.

And I want to remind the commmittee, if you will recall, 1982 was a year of some stringency as far as the budget was concerned. And we were able, during that period, to give special consideration for INS. INS actually was one of the few agencies whose resources went up that year.

We still have a long way to go, but we have recognized the importance of that area and that problem.

Mr. SAWYER. It was severely cut back under the prior administration.

You say we're back to 1978, but we still have a long way to go. Anyway, I just urge that.

One other thing—and I wanted to congratulate you on your request in your budget to beef up the FBI and the DEA considerably, because—again, I hate to keep drawing Bill Hughes into this, but he's the chairman of the Crime Subcommittee and I'm ranking on it. And we have been concerned with this problem, and we are delighted to see that.

But you are adding about $1 billion there. But are you doing anything to balance, then, the prosecutorial personnel available that presumably will be required and prison space available to go with that increase in police officials?

Mr. SMITH. As a matter of fact, for the first time, in considering budgetary matters, we have done just exactly that. We have looked at the whole stream of Federal law enforcement and corrections programs, starting with the investigators and the prosecutors, and then prison space.

And if you will analyze the fiscal year 1984 budget request, you will see we have taken care of each of those areas.

For example, for the FBI we are requesting a $202 million increase of the fiscal year 1983 anticipated appropriation. The U.S. attorneys and marshals will have to go up $20 million. And we are providing $120 million to the Federal prison system—actually, $106 million of which will actually go for the construction or the renovation and expansion of existing prisons or new prisons.

This time, we have looked at the Department's budget from the standpoint of the overall effort and not just segment by segment.

Mr. SAWYER. I had a couple of other questions. But I see my time is up, and I yield back, Mr. Chairman.

Chairman RODINO. Mr. Hughes.

Mr. HUGHES. Thank you, Mr. Chairman.

And welcome, Mr. Attorney General.

First of all, I would like to echo the sentiments of both my colleagues from Kentucky and the distinguished ranking minority member, Hal Sawyer, about immigration.

I will absolutely not vote for the immigration reform bill—although at its inception, I was for it—unless we have the type of commitment to resources that will do something about our borders, something to bring the Immigration and Naturalization Service into the 20th century and to insure that 5 years from now we won't be talking about a legalization program.

And I suspect that a lot of my colleagues feel the same way as I do.

There are a lot of other collateral issues buried in that bill.

Moving on, Mr. Attorney General, I want to also congratulate you, as Hal Sawyer has done, for doing a near 120-degree turn.

A few years ago, you came before us and told us we were going to have to do more with less. That's not possible in law enforcement, as you well know. It's a labor-intensive activity. We lost some ground, in many respects, because we did cut back law enforcement budgets.

The administration has done a good job in south Florida, and I don't subscribe to the remarks of the critics who say we haven't done a good job in south Florida.

If we are serious about it, we can make a difference.

Unfortunately, they borrowed and stole law enforcement people from other areas of the country to beef up south Florida. What they needed was more resources. In addition to the new budget initiatives, I hope you can support the modest increase that I am seeking from the Budget Committee. An increase just a little further will take care of some of the blind spots.

Now, having said that, let me tell you I have some areas of distress. Justice wrote to me, as chairman of the Subcommittee on Crime, a few weeks back, and told me they would not make available the head of the Bureau of Justice Statistics or the Director of the National Institute of Justice on two grounds:

No. 1——

Mr. SMITH. They would not do what?

Mr. HUGHES. Would not make available as witnesses the Director of those divisions within Justice.

We were looking at the structure of both of those divisions. That's very much an issue at this point before the Congress. We needed their testimony, and we were told, in a communication from your Department, that these witnesses would not be made available on two grounds, as I understand it:

One, that you were not given 14 days' notice—you only had about 10 days' notice.

And two, that they weren't the appropriate witnesses to testify about the admission of those agencies.

And listen to the reasons that were given:

Mr. Stewart and Mr. Schlesinger can't testify because, Mr. Stewart has only been on the job 3 months and, Mr. Schlesinger's nomination to be Director of the Bureau of Justice Statistics has not been confirmed.

Now, Mr. Attorney General, who can best testify about the missions, responsibilities, and structure of those divisions other than those individuals who have primary responsibility?

Mr. SMITH. Congressman Hughes, I would have to look into that, because I am——

Mr. HUGHES. I wish you would, because yesterday we met with the President and one thing that was asked was cooperation.

Now, I don't consider that cooperation.

I have received from Justice occasional statements from your witnesses 3 hours before a hearing. We have a 48-hour rule. I don't insist upon that, because I want to cooperate.

Now, for the people in your agency to pull rank in that fashion, you know, that isn't the kind of cooperation that I think we are both looking for.

Mr. SMITH. Well, we certainly do want to cooperate and certainly do not want to take actions that are needless or cause problems.

I really don't know what the history is.

Mr. HUGHES. I would appreciate your looking into it.

Moving on to the EPA matter, I have some great concerns over that.

In some of the press accounts, Mr. Paul McGrath is quoted as saying—this is about January 11—"Criminal prosecution is not under consideration at this time." And he goes on to say, reportedly, "I don't see how we can conclude her conduct was willful"—that is, Mrs. Burford's conduct. "She was acting under orders."

Now, my first question is: Do you know if that is an accurate quote?

Mr. SMITH. I don't know. I'd have to check.

Mr. HUGHES. And second of all, would that be the position of the Justice Department?

Of course, that would seem to be a conclusion on the part of the Justice Department that, in fact, it was not going to be pursued or prosecuted, because the Justice Department has concluded she had not violated law.

Mr. SMITH. Well, happily, Congressman Hughes, that issue is now academic. And anything we say at this point would be what we would do under other circumstances, because what ultimately happened here is what has happened in every previous case, namely the traditional conflict on this subject between the Executive and between the legislative. It has been worked out, one way or another. And this time it was worked out one way or another.

Mr. HUGHES. I ask unanimous consent for 2 additional minutes.

I apologize, but I need to follow this, because I think it's important.

Chairman RODINO. Without objection, so ordered.

Mr. HUGHES. I understand it was worked out. But the civil suit was filed by the U.S. attorney and the Department of Justice, as I understand. The civil suit was dismissed. That was a suit for injunctive relief, as well as for declaratory judgment.

Once that issue was moot, at that point, what was the position of the Justice Department insofar as responsibility of the U.S. attorney to carry out the mandate of the statute?

Mr. SMITH. Well, when that suit was dismissed, it was dismissed presumably on the grounds of judicial restraint. That's neither here nor there.

The judge in the case, when he dismissed it, urged upon the parties to get together and work it out.

Mr. HUGHES. Advisory, I know.

Mr. SMITH. That's right. But that was his recommendation.

We followed that recommendation. We got together with the appropriate people here, and we worked out a settlement of it.

Mr. HUGHES. Let me take you one step further, then.

Working on the assumption of future cases that, in fact, the legislative branch and the executive branch could not work out their differences, what then, is the responsibility of the U.S. attorney, Stanley Harris, at that point?

The Congress has already reported out a contempt citation. The executive branch endeavored, through civil suits, to air that issue—to block, in fact, the prosecution at that level.

What, at that point, becomes the responsibility of the U.S. attorney once it can't be resolved amicably under the statute?

Mr. SMITH. Well, you're now in the area of the hypothetical.

Mr. HUGHES. No; the area of the real world, because that's exactly where we were. We had a confrontation—a constitutional confrontation of major proportions.

I think it's important for us, at this point, to determine the responsibility of the U.S. attorney who takes action under his oath of office that he will faithfully discharge the responsibilities of his office. He's the chief law enforcement officer of the District. At that time, there was a criminal statute involved, and he had, in effect, said at one point, he was going to defer action on that because there's no mandate and timing to report to the grand jury.

However, for future guidance, what is the responsibility of the U.S. attorney once we get to the point where a contempt citation is reported out and the U.S. attorney is under a mandate of the statute to pursue it before a grand jury? What is his responsibility?

Mr. SMITH. Well, we never reached that point. If we had reached that point, then we would have had to resolve it somehow. I don't know how.

Chairman RODINO. The time of the gentleman has, again, expired.

We will allow the Attorney General to answer.

Mr. SMITH. Thank you.

Throughout our history of 200 years, we have had this same constitutional confrontation. And each time somehow it has been worked out. This time it was also worked out.

This time it involved procedures that had not been undertaken before. But I suspect each time this issue has come up before, there were unique circumstances that would apply to it.

If what would happen and if that were not the case, if we did not reach agreement, then, who knows? We just have to wait until those circumstances develop, and see.

One of the reasons we filed that civil lawsuit was so we could have the issue resolved, where it could be resolved in a civilized manner.

In other words, it could be done in the way you would resolve any other good faith, bona fide dispute between the two branches.

We never had to pursue that, because it was settled. We are happy it was settled. It's too bad it couldn't be settled sooner.

Mr. HUGHES. My time is up.

I'm not sure it has been worked out.

Chairman RODINO. Mr. Lungren.

Mr. LUNGREN. Thank you, Mr. Chairman. I note the TV cameras seem to be turned on, and I'm not going to talk about the EPA, so you might want to turn them off right now. [Laughter.]

Except to say, it seems to me to be the threshold question as to whether the legislative branch can totally take away prosecutorial discretion from the executive branch.

I think that's got to be the threshold question, and I'm not sure that is ever going to be resolved until the actual confrontation comes.

Mr. Attorney General, if I can go back to the immigration matter for a moment. I think we ought to acknowledge that both the executive and the legislative branches should share dual responsibility and blame for where we are.

We intended to authorize additional personnel for you last year, but then as a body, the House of Representatives joined by the Senate, refused to appropriate the funds to carry that forward.

But it is a continuing problem. Just last night on NBC News, they interviewed a Border Patrol officer who had been on the southwest portion of the border, then was assigned to the northwest, and has now returned. Basically his message was that he couldn't believe how much it had changed in terms of the amount of traffic, despite the best efforts of the Border Patrol—traffic in human beings, of course. Our southwest border.

And if I can just underscore what others have said, we are going to attempt to have an increased authorization in the overall immigration bill. I hearken back to your first appearance before this committee, when I asked you about increasing significantly the Border Patrol, and you said that your administration was going to. But you wanted to make sure we had new laws in place, and at that point in time, a commitment of resources would be more cost effective.

We are basically going to try to do that for you, but to do it in such a joint effort that you can't separate the two.

The other thing I would suggest is we might start promoting the immigration reform bill as a jobs bill. I'm not one of these that believe every single undocumented alien that comes across takes a job from an American, but I think there's proof at least a significant portion do.

The total amount for INS this year, as I understand it, in your budget, is $500,000,000. We have, in our infinite wisdom, against the votes of some of us here, voted out a jobs bill of $4½ billion to create 200,000 jobs.

And I wonder if we doubled the INS budget and instead of catching $1 million coming across, we caught $2 million, and just assume that one-quarter of those would take jobs from American citizens.

We will have created more jobs through a law enforcement mechanism than we ever do in the misguided jobs bills.

I would like to ask you one question about DEA and FBI. What has been the track record thus far of the cooperative efforts initiated under the administration between DEA and FBI?

We know there were some concerns initially that particularly overseas it might cause some problems, because other Government officials felt that they could deal with the DEA, but were concerned with the FBI because it has intelligence responsibilities, and so forth.

Mr. SMITH. It's worked extremely well. I know there were those concerns, and needless to say, as always, it indicates in situations like this, there are certain growing pains.

But by and large, the consolidation has been very successful. Hitherto, the FBI was never involved with drug enforcement, now have some 1,200 drug investigations going, of which over 300 are joint investigations.

And the very benefits we expected, namely, the ability to utilize the FBI's expertise in getting at the financial aspects of organizations, the structure of organized crime, has worked very well.

There was a certain amount of question about the relationship of the DEA and the local law enforcement officials and vis-a-vis the FBI, that pretty much has been taken care of. Overall, it's been a very successful effort.

So much so that we feel it's hard to imagine having undertaken this task before without it.

Mr. LUNGREN. I have one specific question. It's my understanding we are not doing what we used to be doing. I don't know what the timeframe is, but this is some information I've received in terms of watching noncommercial aircraft traffic, either landing at small fields, just across the border; or in my home town, Long Beach, Calif., where you've got so much noncommercial aircraft traffic that it's very hard to put a handle on it.

It's my understanding there is no DEA contingent there, the second or third busiest airport in the United States in terms of takeoffs and landings.

And I wonder has there been a decision made by DEA that it's not cost effective to be looking at the noncommercial aircraft traffic in the Southwest?

Is it an oversight, or what's going on?

Mr. SMITH. Well, noncommercial aircraft is a prime suspect as far as drug traffic and drug enforcement is concerned.

Mr. LUNGREN. That's why I asked the question.

Mr. SMITH. I don't know what the situation is in Long Beach, but certainly this is one of the prime considerations.

If you couple that with the corruption of public officers, which takes place from time to time, the combination is pretty severe.

However, DEA and the FBI together and particularly, the new task forces, are determining where it's most productive to concentrate their resources.

I can't really tell you where in that scale of things private or nonpublic landings fit of noncommercial aircraft, but I certainly would be glad to look into it.

Mr. LUNGREN. Thank you.

Mr. SMITH. It's certainly a very interesting question.

Mr. LUNGREN. Thank you, Mr. Chairman.

Chairman RODINO. Mr. Hall.

Mr. HALL. Mr. Attorney General, I likewise greet you as have my colleagues. When you get to this point, about the only thing left to ask about is how is the family and the grandchildren? [Laughter.]

Hopefully, they're all fine.

And with that great array of legal talent seated behind you, reminds me of the time Thomas Jefferson sat alone. [Laughter.]

I'll ask one question.

We had a considerable number of hearings on this immigration bill last year, and we have had hearings this session—and every time it's mentioned that we hope to have local law enforcement officials working with the Federal officials administration in trying to enforce this bill, there are those in attendance who usually react negatively to such a suggestion.

They contend that would be the worst of all worlds, to have local law enforcement personnel trying to help enforce a law that deals with local people as much as any law you will ever see on the books.

What is the position of the Attorney General with reference to having local law enforcement people being involved in helping enforce this problem in the event that this law is passed?

Mr. SMITH. Well, I don't think we have taken a categorical position with respect to that. I think it's generally been assumed that immigration enforcement involves certain special knowledge, special training, and therefore, that it should be handled by INS and not by local law enforcement.

I think there is a possibility of a middle ground. I think it's possible, for example, for local law enforcement to cooperate with INS with respect to intelligence information, or perhaps otherwise. Sharing intelligence information regarding violation of immigration law is an area where we could encourage cooperation.

But in terms of actually having local law enforcement become part of the extended enforcement arm of INS, we have to look into that before we could appropriately answer your question.

We would have some reservations about that.

Mr. HALL. Well, if you get down to the enforcement provisions—of whatever type law we pass, I think we're going to still have your illegal aliens coming into this country. We are going to have employers hiring these people, and they're probably going to be placed in various and sundry places as far as living accommodations are concerned.

Don't you think it's going to be an absolute necessity to have a working relationship between local law enforcement personnel to ferret out and find out where these people are living, and where they may be working?

Mr. SMITH. I think that would fall within the area of cooperation. In regards to what I'm talking about it is a little hard to draw a final line but certainly cooperation is something that could be valuable all around, but it would not necessarily mean the local law enforcement people were engaged in the INS work.

Mr. HALL. What has been the relationship in the past with the federals working with the locals in trying to work on this problem?

Mr. SMITH. Well, I think it's been somewhat spotty. In some areas, and it's true across the spectrum—it has worked quite well. And in other areas, they don't even talk to each other. I can't really specify the places and locations.

But my understanding is—and I can't say I have really looked into this recently—my understanding is it's spotty, and in some places, it works very well.

Mr. HALL. I just think from a practical standpoint if this immigration bill is passed, there needs to be a strong emphasis made on trying to get a very close working relationship between the two agencies.

I think it's absolutely necessary.

I yield back the balance of my time.

Chairman RODINO. Mr. Gekas?

Mr. GEKAS. Thank you, Mr. Chairman. In general, I would like to focus attention a little bit on the *Hinckley* case, to which you alluded in your presentation, in support of momentum to be gained in the question of shifting the burden of proof in the mentally ill concept.

Assuming, as I am ready to assume, that this Congress is going to act positively and at least shift the burden of proof to the defense, there is an attendant question that is nagging me, and to which I am going to be addressing new legislation in the hope I can gain your support.

And that is this: Assuming that we complete all our endeavors in rectifying some of the wrongs that we have seen in the Hinckley matter, I personally believe that it would go for naught if we did not have preemptive exclusive jurisdiction on the part of the Federal Government to prosecute a case in which the President or Vice President of the United States be attacked.

What I'm getting at is this: If we just pass the burden of proof legislation, then leave all other matters as they are, it is possible that a State could undergo a prosecution in a given case—God forbid—of another attack on a President, and then all the rules that we have put in place might go for naught, because the State would seize jurisdiction and the Federal Government would be on the sidelines, so to speak, waiting to see what would happen here.

Now, I know the Federal Government has major jurisdiction—discretionary jurisdiction—and we could seize that jurisdiction if we wanted to.

But most of the time, we defer to the State government to pursue those type of cases.

I want to introduce legislation and ask for your considered opinion on it, too, in just that these limited cases with a President and Vice President of the United States be the targets of such assassination attempts, that in those cases, the Federal Government have preemptive exclusive jurisdiction.

Do you have any thoughts about that?

Mr. SMITH. Well, of course, this whole area of crime centers on State and local jurisdiction for these matters. And that is really where it ought to be.

It's true, there may be special situations where the Federal Government should have the principal jurisdiction. Really, we would be very happy to take a look at what you are proposing.

Mr. GEKAS. That's all I have.

Mr. SMITH. And we will give you our thoughts on it. Be happy to do that.

Mr. GEKAS. Up to now, I think I may have misunderstood, in having talked with some of your people, that did not make it clear enough what I say here concerning exclusive preemptive jurisdiction.

Mr. SMITH. For designated offenses.

Mr. GEKAS. Yes; only in those limited cases.

Shifting to another matter, on the question of the exclusionary rule, do you agree with me that this might be moot, if the Supreme Court finally deals with it, in a case pending before it, if it indeed decides that it does exist, a good-faith exception to the exclusionary rule; or do you believe we should proceed regardless of it?

I have been taking a position personally that we should take a wait-and-see attitude, and see what the Court does.

Do you feel we should move full speed ahead on that issue, regardless?

Mr. SMITH. Yes, we do think so; although it's quite possible that the Supreme Court may have some questions for us.

We just don't know. It all depends on what they say and how they say it.

But in our view, this is a change that is badly needed, and we think that Congress should pursue it, irrespective of whether the courts act or at least until the Court acts. What the Court does might affect that, of course.

Mr. GEKAS. In fact, if the Supreme Court does allow, through its decision and good-faith exception to the exclusionary rule, would you then continue to favor, as I would—I don't know—would you favor pursuing questions of civil liability for faulty law enforcement measures, even under the good-faith exception?

That is, to balance the equation a little bit, that if indeed, even under a good faith, they are grossly negligent, that some civil remedy might be available for the aggrieved person?

Mr. SMITH. Well, that's an area, of course, that could be studied and reviewed. And in that connection though it's not on exactly the same subject, although we think it's close, is a very important piece of legislation—the Federal Tort Claims Act. It has been proposed for a long time now, and we think from the standpoint of law enforcement that it is as important as almost anything else we have been talking about.

Mr. GEKAS. Thank you, Mr. Chairman.

Chairman RODINO. Mr. Glickman.

Mr. GLICKMAN. Thank you, Mr. Chairman.

I have some questions concerning the constitutional questions involving the *Ann Gorsuch Burford* case. Your legal staff has indicated that the Justice Department has exclusive authority and absolute discretion to decide whether to prosecute the case or not. That is contained in all the documents that I have seen that have come out of the Department of Justice. That doesn't say for executive privilege purposes, although that is what was involved in this case. It's really unqualified, what you're telling us today, is that you have the absolute right to decide for any reason whatsoever whether to prosecute a case or not, whether Congress orders you to do it or not.

And, therefore, I reject the point that you're saying this is a hypothetical problem. I think it is a real problem that will come up over and over and over again, and that, based upon what you have told us today, will be decided on an ad hoc basis. It would be up to either you or your successor U.S. Attorney Generals to decide. There is no policy on which you are able to base decisions on these questions, except on an ad hoc basis. And it worries me very much that this is the most serious constitutional question we have—the question of what powers do we have over you to give you guidance and instructions and directives on when to prosecute somebody.

And I gather from what you're telling me today, it is, that we have no power except the power of persuasion. I gather what you're telling me today is, the only way we could have locked up Mrs. Burford, would be to physically instruct the Sergeant-at-Arms of the House to go pick her up and put her downstairs in the stockade of the House and maybe let her stay in the Speaker's Office for

a while, until you would file some sort of a case to pull her out of incarceration.

Now is what I am saying a correct statement of where you perceive the law to be?

Mr. SMITH. It's not correct at all, so far as I can tell.

Mr. GLICKMAN. Then tell me where I'm wrong.

Mr. SMITH. We have never taken any flat, categorical position such as you have just enunciated. The only positions we have taken are positions that deal with the specific facts in this case. The positions we have taken, you referred to them as—you are now in the most important constitutional confrontation or crisis—however you put that—that has been the case every single time when this issue has come up during the last 200 years. This is just another in a long series of exactly that kind of confrontation. In past cases, it has been resolved one way or another. In this case, it was resolved one way or another. It happened to involve procedures somewhat different from those that have been taken in the past, but it was resolved. What would happen if it were not resolved, who knows? That depends on the facts of the case as they then develop.

It's quite possible, we could even go further down the road and still have it resolved without having to face that constitutional confrontation. So the idea that this somehow is separate and unique and different and of a greater proportion than similar issues that have arisen before just isn't so. It just so happens this one got further down the road than has been the case in the past.

Chairman RODINO. Will the gentleman from Kansas yield?

Mr. GLICKMAN. I'll be glad to.

Chairman RODINO. Mr. Attorney General, do I hear you to say then that this issue will never—never be resolved? We're going to rely on confrontational situations each time to make a determination?

Mr. SMITH. Mr. Chairman, I hope it will not be confrontational. Unfortunately, it was in this case, but in most cases it isn't. In most cases it's worked out on some basis or another, and that is as it should be.

Now, so far as I can tell, in terms of ultimately resolving it, let's assume that there is a confrontation or dispute that cannot be resolved. I don't like to get into these hypotheticals, because everything is different. Every fact is different. I assume, ultimately, that question, with respect to the specific facts, in a given case would have to be resolved by the U.S. Supreme Court. And that happened, of course, in the *Nixon* case. Excuse me. That was the case where you sued us. We didn't sue you.

And the facts, of course, were somewhat different. I think that if the issue were finally to be resolved by that Court, the Court, based upon what it has said so far, would indicate there are appropriate areas of executive privilege where documents should not be provided. But that's pure speculation. I don't know that. Happily in this case, we don't have to reach that point, and happily, we won't have to reach it in the future.

Chairman RODINO. Thank you for yielding.

Mr. GLICKMAN. Can I just have another minute? I have your document, "Plaintiff's Motion for Summary Judgment, A Civil Case," which is interestingly entitled "United States of America v. The

House of Representatives." And I'm sure folks have referred to the designations before. But in your points in support of "Plaintiff's Motion for Summary Judgment," you state uncategorically, "It is now well settled that the executive branch has exclusive authority and absolute discretion to decide whether to prosecute the case."

And I believe, Mr. Attorney General, that notwithstanding your previous statement which indicates, "Well, this could be a problem, but we have always resolved it on an ad hoc basis before," that it does require some sort of statutory solution in the future. And I will ask you, would there be any statutory modifications that you could see that could survive constitutional judgment that might let us deal with this issue a little more effectively in the future?

Mr. SMITH. Of course, you're not going to find any statutory solution, and that is going to override basic constitutional problems. What you're saying there is really a statement of the proposition which is well-established; namely, that it is the Executive's function to exercise prosecutorial discretion. I don't think anybody argues with that.

Mr. GLICKMAN. But you see, what you have done, you have cited the Constitution before. In fact, Mr. Fish talked about the constitutional versus statutory requirements you have here. I can find nothing in the Constitution that speaks to prosecutorial discretion or executive privilege. I have the document in front of me.

Mr. SMITH. You may find it in a Supreme Court decision.

Mr. GLICKMAN. I'm not sure that's true on the point of executive privilege. I guess my point is, if there was a statute that required you to take a prosecutorial point of view, you did it, because you relied on a constitutional point of view, which a civil court said was an improper point of view.

Mr. SMITH. I don't recall the civil court——

Mr. GLICKMAN. The civil court ruled on—talked about the executive privilege issue. I guess my point to you is, I think we've gotten to where we're in constitutional limbo right now, and the problem could become more serious, unless we try to reconcile it much more effectively than we did in this case.

Thank you, Mr. Chairman.

Chairman RODINO. Thank you. Mr. DeWine.

Mr. DEWINE. Thank you, Mr. Chairman. Mr. Attorney General, I would like to get away from the EPA just for a moment and congratulate you and the administration on the resources in the targeting of the drug enforcement problem in this country. I spent a number of years as a county prosecutor in Ohio, and it seemed like we spent most of our time prosecuting drug cases. I think the Federal Government does have a role in this, and frankly, it's an essential role. And I'm glad to see the administration taking what I would consider to be an aggressive stand in that area.

A couple of questions in regard to that. What has been your experience with cooperation in the Florida operation—the cooperation between the Federal Government and local law enforcement officials?

Mr. SMITH. Actually, one of the heartening things about the whole south Florida operation is the fact that so many different agencies—not only the Federal Government, but also State and local—were able under the umbrella of the single organization to

cooperate as well as they did. It's that experience actually that has given us the impetus, really, to go forward with the 12 other task forces that we have established around the country. These are based upon the same type of cooperation as happened in south Florida.

As you know, we have also formed the law enforcement coordinating committees. In each of our 94 districts, we have encouraged our U.S. attorneys to take the lead in putting together groups made up of representatives of law enforcement—State and local—for the purpose of pooling their resources and determining their own law enforcement priorities. It is all based upon cooperation and the results have been extraordinary so far. It is certainly one way to greatly improve our law enforcement capability without spending a dime.

Mr. DEWINE. So you think we are getting away from the inherent jealousy and conflicts that we find with local law enforcement and the Federal role? Are we making progress?

Mr. SMITH. Very much so. Where two or more are gathered together, sooner or later you're going to have problems of some kind, but the fact is, these groups have worked together remarkably well, and we certainly anticipate that the cooperation will continue.

Mr. DEWINE. Mr. Attorney General, I'd like to switch gears a moment and talk about civil rights. This administration has been criticized for lack of vigor in the area of civil rights. I would like to know if you can address that.

Mr. SMITH. Well, all I can say is, that is nonsense. The fact of the matter is, we have as vigorously enforced civil rights and civil rights statutes as any prior adminstration, and in some areas, more so.

For example, we brought more criminal civil rights actions than any previous administration. We are adding 15 new positions to the Civil Rights Division. We have made only two changes in terms of our enforcement effort there. Both of them have to do with remedies. They don't have to do with rights. One is mandatory busing, which has not worked, in our opinion. The other is quotas. Quotas have been counterproductive. They have been instruments of discrimination in the past, rather than instruments of curing discrimination. They tend to be a ceiling, not floors. But with the exception of those two areas, we are enforcing the civil rights statutes and, of course, also in those areas, if you're talking about remedies for violations.

Mr. DEWINE. Mr. Attorney General, I noticed in your statement, I believe in the proposed budget, that there is not money directly for local drug enforcement.

What is the theory behind that?

Mr. SMITH. Well, I think you're talking about the local drug intelligence group grants.

Mr. DEWINE. Yes.

Mr. SMITH. We think those are activities that should be essentially funded by State and local people. To the extent that they are performing the job they should perform, they are spotty, especially in terms of effectiveness. These are also groups over which we have only limited control. We think, to the extent, that State and local

people perform the function, they should be funded through and the activity should be performed by State and local authorities.

Mr. DEWINE. Is this a major shift in policy?

Mr. SMITH. No.

Mr. DEWINE. They have not been funded extensively in the past anyway, have they?

Mr. SMITH. Yes; but we have taken the position not to fund them in this budget, the same position as was taken in the past two budgets on that subject.

Mr. DEWINE. Thank you, Mr. Chairman.

Chairman RODINO. Mr. Frank.

Mr. FRANK. General, I think we have, as Mr. Glickman stated, a fairly serious constitutional question, and that is, when the executive branch and the legislative branch disagree about the propriety of certain specific information being produced, is there recourse to judicial resolution? I had hoped that there was, but I think your Department has told us that cannot be. Judge Smith, in the opinion we have all referred to, said, with regard to the contempt statute, "The statutory provisions concerning penalties for contempt of Congress constitute an orderly and often approved means of vindicating constitutional claims." It provides for legislative investigation.

He goes on to point out, in his own words now, that "Constitutional claims and other investigatory procedures may be raised as a defense in a criminal prosecution."

I had always assumed, that if there was honest disagreement between the branches as to the propriety of certain information being produced, a contempt citation would issue, and we would go to court. The problem is, your own Department has announced, not hypothetically, not in a vacuum, not potentially, but flatly, the points and authorities submitted in that case, that there was simply nothing Congress could do to require you to bring a prosecution, if you didn't want to. In fact, it is apparently, according to your description, not even a matter for high constitutional discussion. You tell us it is the U.S. attorney for the District of Columbia, without consultation with higher officials in the Justice Department or the White House, who decided on his own, simply not to bring a case which the Congress thought it was making mandatory. That's the problem we have.

So I think I have to ask you if we have between us an honest difference, we think the documents should come out, and you think they shouldn't, how do we resolve that?

Mr. SMITH. Well, as a matter of fact——

Mr. FRANK. No; I'm not asking—I know how we did resolve it. I'm talking about the future.

Mr. SMITH. We tried to resolve that by filing a civil action,

Mr. FRANK. And you were thrown out of court by the judge, who said——

Mr. SMITH. No; that was thrown out because of the fact the House took the opposite position. The court should not decide it.

Mr. FRANK. Oh, General, that's absolutely a misstatement of what the House said. The House said yes, the court should decide. The court should decide, not in a lawsuit, which you claim to be the United States and were chopped liver but in a lawsuit which is

set forth in the statute books, which says, "Here's the way you do it." And the judge didn't say it's not subject to judicial disposition. He said, the judge shouldn't decide it prematurely. He said that there were laws on the books that tell you how to do this. We bring a contempt citation. You raise defenses.

Now that the judge has thrown your suit out, how do we act in the future. If we disagree, we will try and negotiate as Baker and Levitas did for weeks and weeks. Suppose people cannot agree? How do we resolve the dispute? If your Department has taken the position that constitutionally, inherently, if the executive branch refuses to let this go to court in a contempt citation, it cannot go to court? So how do we do it?

Mr. SMITH. Congressman Frank, we did resolve this case.

Mr. FRANK. How, in the future, if we have disagreements?

Mr. SMITH. What happens in the future? Who knows? It all depends on what the facts are.

Mr. FRANK. That's not an honest answer, because you have——

Mr. SMITH. Certainly, it's an honest answer.

As a matter of fact, you're talking strictly about what may happen in the future. This is an issue that has come up in every administration since the administration of George Washington. And in each case, it has been resolved.

Mr. FRANK. General, that is totally evasive of the question.

Mr. SMITH. It was resolved in this case.

What do you want to fight about it for? You've got the documents. The case has been resolved for all practical purposes. There may be another case; there may not be another case.

So, what are you arguing about?

Mr. FRANK. What am I arguing about?

Because you and I are officials of the Federal Government, with some duty to try and find out how to prevent an obscene set of events from recurring.

Mr. SMITH. And we have done our duty.

Mr. FRANK. What you did, General, was—in this case, if you think——

Mr. SMITH. I gather you didn't like the way we did it?

Mr. FRANK. If you find anybody who likes the way you did this, you bring them up here, and I'd be glad to listen.

If you think the way we did this, which winds up with your EPA Administrator being fired, or resigning, or whatever—and with all these other disputes—if you think that's a sensible way to do it, then, I disagree with you.

Mr. SMITH. Well——

Mr. FRANK. Please, General, I would like to finish my question.

Mr. SMITH. Will you let me finish my answer? Or is there a question?

Mr. FRANK. Yes; there is.

I'm asking you, in the future, how do we resolve this?

You tell me we resolved them in the past. You then seem, to me, to be critical because I wondered how we resolve them in the future.

I can accept the fact there will always be the possibility of negotiation. What I do not accept is that we should leave it at that, because what you are finally saying is a problem two grounds:

We cannot require this to go to the court, in the first place because you say you have absolute prosecutorial discretion, in the first place.

And second here's a puzzle I have, when Chairman Rodino asked you in his letter to talk about the potential conflict of interest with you, both representing an executive branch official but then, perhaps, having a contempt citation, you said, "No problem."

But in your filing, in the footnote to page 36 of your points and authorities, you say that the inability to prosecute Mrs. Gorsuch has several dimensions.

One was your absolute discretion. But also you say because the Attorney General counseled the President to instruct her to withhold the documents, it would raise serious ethical questions for the Department to undertake a prosecution. That would be the case everywhere.

So, apparently your position is that it would be unethical for the Department ever to bring a prosecution of contempt against a Federal official.

So I would like to repeat the simple question: If, in the future, we cannot resolve, through negotiation, a legitimate good faith dispute between Congress and the President about what documents ought to be presented to Congress, how will we get into court, given your telling us that the statutory scheme exists, using the contempt citation, is subject wholly to executive discretion?

So, if you decline to bring the case, then no case. Then, we can't deal with the question of executive privilege.

Mr. SMITH. I guess there's a question in there somewhere.

Mr. FRANK. Yes.

How would we resolve the dispute, General?

If you don't understand the question, I'll repeat it very slowly, with the smallest possible words I know.

Mr. SMITH. Please do.

Mr. FRANK. How do we resolve the dispute between the executive and the legislative branches about the propriety of particular documents being brought forward to Congress if the Department continues to take the position that we cannot require this to be brought in a lawsuit before the judiciary through the contempt process?

That is my question.

Mr. SMITH. There is no way to answer that question except in the context of the facts of the case as they then develop.

The only thing that we can do is to take positions with respect to the facts of the case that we have here. We have done that.

This issue was presented, and it has been resolved. And that's it.

Mr. FRANK. There's no——

Chairman RODINO. The time of the gentleman from Massachusetts has expired.

Mr. FRANK. Mr. Chairman, if I might have 30 seconds.

Chairman RODINO. Has the Attorney General answered the question?

Mr. SMITH. I think so, Mr. Chairman.

Mr. FRANK. Mr. Chairman, I think we are left with a great constitutional dangle. And I would hope this would be a matter the committee will pursue.

Chairman RODINO. I would advise the gentleman from Massachusetts that the chairman certainly anticipated that this question would not be resolved today.

And we appreciate the Attorney General having come here to try to answer the questions.

We do know the Attorney General has stated unequivocally he is going to work with the committee to at least try to reach some understanding as to when we ask for information and documents, that we can get that information and documents so that we can proceed with at least a consideration of the very vital issues.

I believe it is important.

Is the gentleman asking for 30 more seconds?

Mr. FRANK. No, Mr. Chairman.

I just wanted to address you as I just did.

Chairman RODINO. Well, then, I will ask Mr. Schumer.

Mr. SCHUMER. Thank you, Mr. Chairman.

And thank you for staying around so that we, younger members—junior members, can ask questions.

My questions really relate to the procedures that one must follow in order to determine that a document is privileged. And this issue will occur again at some point in the Republic's future.

How does one determine which documents are privileged and which documents are to be available to either the public, the Congress, or whomever else?

What procedure was used to determine that these documents were privileged?

Mr. SMITH. There were a significant number of different individuals, including those who are directly involved in the litigation, who determined whether or not it was the type of document that, if it fell into the hands of those being investigated or prosecuted could do damage to our efforts or perhaps even abort them.

That conclusion was reached in each case by both the career attorney and what you might call the "policy attorney."

And their conclusion on this subject, whether or not they were that kind of enforcement-sensitive document, was unanimous in each case.

Mr. SCHUMER. So, if there was a disagreement, the document would be sent up to higher authority to resolve the conflict?

Mr. SMITH. Well, I can't really say from my own knowledge. As I understand it, there were no disagreements on it.

Mr. SCHUMER. And there was no higher review?

In other words, if the career attorney and, as you call it, the "policy" person——

Mr. SMITH [continuing]. Yes.

Mr. SCHUMER. Both agreed that the document ought to be withheld, then the document was withheld?

Mr. SMITH. Well, of course, this was just not the one agency. This would be a similar group in the Lands Division, in the Office of Legal Counsel and EPA, and also the White House.

So, there are quite a few people who looked at these documents and came to that conclusion in each case.

Mr. SCHUMER. I'm not disputing any specific document.

Mr. SMITH. Yes; I understand.

Mr. SCHUMER. What I'm trying to ascertain is was there a set procedure.

And now, as I understand the answer, there was a career attorney and a policy attorney, both from the Justice Department, correct, who went over the documents?

Mr. SMITH. Well, as I understand it, there were two from the Lands Division, people directly involved in litigation; two from the Office of Legal Counsel—both in the Department of Justice.

The same thing in the White House, although I don't know whether you distinguish between career and policy over there.

And also EPA.

So that this is a unanimous conclusion of a lot of people.

Mr. SCHUMER. I'm concerned about this issue in the future, which we may find vexing.

You're saying the procedure is that somebody in the White House reviews all these documents and signs off, that they should be privileged as well?

Mr. SMITH. No; I'm saying that happened in this case. I don't know whether that is a procedure.

Mr. SCHUMER. Is there a procedure established? I'm sure this issue has come up before that some attorney in some litigation has said, "We can't reveal to Congress," or "under the Freedom of Information," or for some other reason, "this document."

My question is: What procedure is used? Is there a standard procedure? Is there any written regulation as to how to determine what is privileged and what isn't?

Mr. SMITH. That is a decision that's made—I can't tell you how it is made in each case.

I can tell you how it was made in this case, as reported to me.

Mr. SCHUMER. I understand that. And I appreciate that.

But what I am asking is: Are there a written set of rules that determine when a document is privileged and when it is not privileged?

Is there a set written procedure that is made to so determine that?

Mr. SMITH. Well, there may be. But if so, it hasn't come to my attention.

Mr. SCHUMER. So, this is basically done on an ad hoc basis?

Mr. SMITH. I would assume so.

It's pretty hard to handle these things any other way than ad hoc.

Mr. SCHUMER. Given the sensitive nature—and I think none of us can deny the sensitive nature of this issue now, if not 3 or 4 months ago—don't you think it would be a good idea to set up some kind of written and established procedure?

Mr. SMITH. Well, maybe yes, maybe no.

Actually, so far as I know, this particular issue has not resolved whether or not those are sensitive documents.

As I understand this issue, it is whether, assuming they are sensitive documents, they still should be produced.

I don't know of any issue that has arisen as to whether they are or are not sensitive.

Mr. SCHUMER. At least to my colleagues in Congress, you have been involved in this issue.

As they have expressed it to me, the issue is that there was great fear the documents that were not sensitive from a litigation point of view were being withheld, and they had no way of knowing that those documents were not being withheld. And that is what I am saying.

Mr. SMITH. I'm not sure.

Mr. SCHUMER. That is why I am saying I think some kind of established procedure might be helpful, because somebody could make a decision for a different kind of reason. And that was what our fear was. And that is, I guess, what the fear still is, the issue of executive privilege. Since this is where the conflict of interest comes out, and people have different motivations, maybe some illegitimate, but many legitimate. One half of the brain, if you will, is making the decision when another half of the brain ought to be saying something else. At least if there are set procedures there and they can check and things that might be clarified.

But I think one of the things that leads to mistrust between the two branches of Government on this issue is there was a feeling that whichever documents might be sensitive, for one reason or another, might—not were, but might be withheld. You follow my line?

Mr. SMITH. Yes; I follow your line.

But are you aware of the fact that a staff member from one of these committees examined at least half of these documents in place long before any of this became the issue it is now?

Mr. SCHUMER. Unless someone had examined all the documents, there was always going to be that fear.

Mr. SMITH. Well, of course, you talk about having standards. Actually, this is essentially a judgmental matter, and it's a judgmental matter that has to be made by those who are familiar with the case.

You can have all the written rules in the world and they're not going to substitute for the exercise of appropriate judgment.

Mr. SCHUMER. This is a judgmental question. That's why I don't think I asked for standards. I asked for a set of established patterns of procedure by which there would be independent review and review away from the conflict of interest.

But I would just ask you to think on that, and maybe something could be devised—and we don't spend all this time arguing about whether it could be better in the future.

Mr. SMITH. Well, we certainly welcome any suggestion to improve the procedures.

Chairman RODINO. Mr. McCollum.

Mr. MCCOLLUM. Thank you, Mr. Chairman.

Mr. Attorney General, I just want to say we're glad to see you today.

I enjoyed this weekend with so many members of your staff and associates and yourself.

I think what you have said today—and I heard about 90 percent of it—has been most helpful to us. And I'm not going to rehash a lot of these things.

I am particularly concerned, as you are, about the immigration reform bill and all of the things that go with the many questions about them.

I know someone has called to your attention the shortfall on the adjudication side of this, which, in Florida, still underlays all the rest but is still part of the package and is a tremendous problem.

And you are, I'm sure, fully aware of the fact that not only do we have the backlog Mr. Nelson testified to of some 86,000 asylum cases nationwide, but we have, in the Miami area, been unable to get any real determination in numbers with respect to the 1,100 or so who were released from Crome.

But there are only, as I understand it, about 60 or 70 of those cases that the special inquiry officers have even heard to this point. And I know part of that is because of the attorney pro bono matter down there.

So, we have your assurance—I assume we do, since we have talked so many times about this before—that regardless of what happens to the immigration bill, that every effort will be done and no effort will be spared to move those cases, particularly in that critical area—in the Miami area.

Mr. SMITH. Well, you give me the occasion to support the immigration bill. I certainly hope that when the procedures are considered that our recommendation with respect to streamlining the procedures especially with respect to making asylum decisions and other decisions in these areas will be favorably considered. This is important because there's no question about the fact that there is a backlog.

And if we cannot streamline these procedures, the problem you are mentioning is not going to get better. It's going to be exacerbated.

So, we strongly urge that serious attention be given to streamlining those adjudication procedures.

Mr. MCCOLLUM. Mr. Attorney General, what worries me, and even if we pass the streamlining, I have my own concerns about the nature of the streamlining—but whatever version you pass, that we not get the processes going the way we need to, because of the enormous backlog. And I am in hopes your staff and, of course, Mr. Nelson, are acutely aware—as I think you are, and you have been giving it prodding to developing a plan to get that caseload of work down, even under a new system, because it just isn't going to happen, I don't think, overnight.

I don't think you believe that.

Mr. SMITH. No; we're simply doing the best we can, and it's a tough job.

Mr. MCCOLLUM. I have one other point in the immigration area. The district offices around the country maintain the files—the regular, normal naturalization files and immigration files. I know that there is an effort for which you are asking for money in this authorization bill to get the computers to make a central filing. I have had a lot of complaints, and I pointed it out to Mr. Nelson the other day, from the local areas around the State of Florida, that are the subdivision offices, not the district offices. They, themselves, don't get the files that they need to work on very easily out of the district office, and I think that's universal around the country, and I am encouraging you, as well as him, to look at not just the computerization of those files, but the potentially active files to the subdivision offices in locations outside the district office, so

they can be worked. I think that would add to your efficiency and save a lot of cost.

I have a question, though. I don't want to just talk. One point you made today, I notice is in the area unrelated to immigration. The question of the insanity defense, and I notice, as I did this weekend, that you anticipate sending up another bill supporting a slightly varied version of what the administration did last time, as I understand the ABA bill. I would hope, since a number of us very strongly support the original effort that your office made for a mens rea approach to insanity, and because I heard Mr. Guiliani say that was still the preferred version in your shop, though you were worried about how it was being received, that you would indicate that.

And I'm asking you today if, in fact, though you are concerned about its passage ultimately in the form that this mens rea approach you set up last year would still be the Department's preference, if you had your druthers; is that not true?

Mr. SMITH. Well, that was our first proposal.

Mr. MCCOLLUM. Yes; your first proposal would be still your preference, although you're going to send up another proposal?

Mr. SMITH. That's what it amounts to; yes.

Mr. MCCOLLUM. Thank you.

Mr. SMITH. In other words, either one would be sent, but the first one would be the mens rea, although the other one certainly would be a great improvement.

Chairman RODINO. Mr. Shaw.

Mr. SHAW. Thank you, Mr. Chairman.

Mr. Attorney General, there were a lot of us on both sides of the aisle who were a bit critical of the administration because of the funding request from Justice and the budget. I see most of that criticism has been answered this year, and I would compliment you and your staff and the administration for giving the increased emphasis that is going to be necessary for the continuation of the program.

I would also like to compliment you most sincerely on your efforts as part of a team in south Florida with the task force. We have been examining the results of that very closely, both here in Washington and down in south Florida, including my old county of Broward County, and I can assure you that the success is quite significant. I also am pleased to see you are going to spread this into 12 additional task forces around the country.

Can you give us a time schedule on exactly when that is going to happen or perhaps give us some update as to how far you have come along?

Mr. SMITH. Actually, it has happened already. We now have all 12 core cities designated and 12 task forces in place. They have skeleton staff at this point. I think I mentioned earlier, each has in place on an average of about 20 investigators and 4 or 5 prosecutors. We expect to be up to full strength by summer, and at that time, we should have overall, about 1,600 investigators, prosecutors and support staff in place. Active cases have already been assigned to each one of these task forces. The last point is important, because we can't start the investigations too soon, and that is why we want to crank up early and get going. We are very pleased with

the progress we have made thus far, and we are certainly on schedule.

Mr. SHAW. Have any of the task forces involved the military to the extent that the south Florida task force has?

Mr. SMITH. Well, south Florida involved interdiction to a degree which will not be the case with some other task forces. There will be interdiction activities by some of the others but some will not be heavily involved in interdiction. Obviously, those that are inland will not involve interdiction so much. Interdiction of a different kind. Also, to the extent possible, we are utilizing the available intelligence, and in some cases, the resources of the Armed Forces.

Mr. SHAW. Do you think, as the task force is turned over to Justice entirely and taken out from under the Vice President, do you think you will be able to continue to get the full support of the military, to the extent that they are involved in support of this kind?

Mr. SMITH. Well, every indication is certainly to that effect, and if that doesn't happen, why he may get back in again, although he hasn't left yet, as far as south Florida is concerned.

Mr. SHAW. I understand that. I know there have been some problems involved with the military being involved in this matter, to the extent they have. But I think this is probably one of the most successful things that we have done in law enforcement in the recent decades up here in this country.

I would like to switch subjects just a moment and ask you how many subcommittees and committees of Congress right now are having some kind of hearings which are affecting or having something do with the supplying of papers, documents, memorandums, reflected from the EPA controversy?

Mr. SMITH. I'm afraid I can't answer that question. The Department of Justice's principal concern is with the Judiciary Committee and its subcommittees. Needless to say, there are other committees involved, but I really won't be able to guess as to how many are involved in that effort.

Mr. SHAW. I also serve on the Public Works and the Transportation Oversight Committee—Congressman Levitas' committee. I might say, in working with your staff, there obviously was some friction there, but I feel now that there is a full spirit of cooperation. They're handling themselves in a very professional manner, and I think the documents that were once withheld that have been shown to us reflect some judgment calls. Whether they are in full agreement or partial agreement or disagreement, they at least do contain the elements that are well represented to us.

I yield back the balance of my time to the chairman.

Chairman RODINO. Mr. Attorney General, I just want to conclude by first of all observing this matter, as you can appreciate, is a matter that isn't going to go away. Only in the sense we feel we have a responsibility as a legislative body to really pursue it, until we know that either it's going to be left to the future so-called situations. But I want you to know this has been something that has been of concern to us for a period of time, long before it developed as well in the newspapers. We wrote to the Library of Congress and to other areas we felt were going to be important, and I'd just like to call your attention to—and you don't have to make any comment, because you have been more than gracious with your ac-

commodation of whatever we tried to ask of you—but we have asked the present law division of the Library of Congress—its Research Office—on January 10, 1983, to provide us with a legislative history and judicial interpretation of title 2, United States Code, section 194. Section 194 provides statutes relating to that contempt of Congress. I would just like to read the pertinent part:

> Although the courts have generally been reluctant to construe statutory provisions as limiting the prosecutory discretion of United States Attorneys, it appears that Congress could, by appropriate statutory language, restrict the scope of prosecutory discretion.
> See 11 American Criminal Review 577, 607.

And the Supreme Court, in the confiscation cases, supra 274 U.S. and 457:

> Public prosecutions, until they come before the court to which they are returnable are within the exclusive discretion of the District Attorneys. And even after they are entered in court, they are so far under his control, that he may, at any time before the jury is empaneled for the trial of the case, except in cases where it is otherwise provided in some act of Congress.

See, we really are looking and searching for an answer to this, because it can develop again, and there is going to be wrangling, and the public is going to be confounded as to whether or not the Justice Department, which is acting for the executive branch is, indeed, reluctant to do the things that it's required—at least we believe it is required—to do, and the Constitution, as we all know, provides that even the Chief Executive must faithfully execute the laws of the land.

Sometimes we take issue with that. This body has, indeed, authority to then take some kind of action, and that is why we are concerned with these questions. This is why we are concerned about how the decision was made not to present the facts of the Burford contempt to the grand jury, but rather pursue a civil action against the House. This is why we'd like to know whether or not it wasn't just consultation, but whether a decision was made by the Justice Department not to go ahead and prosecute and say we won't go ahead with a criminal case, and on what basis.

And I think what I'm trying to say is that what we have done today hasn't been, as I said initially, not a partisan effort to try to again rehash something old, but I think to help us in order that we, as a body with legislative responsibilities, be able to put this thing to rest, if, indeed, we can. And while I appreciate your saying, "Well, we don't want hypotheticals, but the fact of the matter is that, as I understand it," and you can correct me here if I'm stating it wrong, "there has never been a time when the Congress issued a contempt citation against a member of the executive branch, which was acted upon in this manner."

Mr. SMITH. Mr. Chairman, I don't think there has ever been a time when Congress has issued a contempt citation for an official, such as was the case here, because that is the first time that's happened. Let me say that I certainly hope that we will continue to be able to resolve these issues as they arise in the future. We have succeeded in doing so for 200 years, and let's hope we will continue to do so. It's quite possible we may not have another one of these issues arise for another 200 years, and we hope that's the case. However, I think it is true that whenever you have a system of sep-

aration of powers, you are always going to have some question as to where the boundaries are drawn between those branches. I think it's inevitable.

We see it, and we have seen it, for example, in connection with the questions of Supreme Court jurisdiction. We see it here in connection with what is the responsible duty of the Executive to enforce the laws and what are his prerogatives in order to properly perform that function vis-a-vis the rights and powers of Congress to obtain documents.

I don't think that there is any way, through any statute or short of amending the Constitution, that will draw those lines so sharp that you are not going to have issues or questions or disputes over what falls on this side or that side of that line. Perhaps that's the way it should be; that may be one of the prices you pay for having a system of three separate branches. If so, it's a very small price. This happens to have been a situation where the action we took, we think, was entirely proper. The same kind of action has been taken over the last two centuries.

It's too bad it developed the way it did. But I think that where you stand on a principle of that kind, which I think we have to—you do, and we do—then, from time to time consequences develop in ways that one would prefer would not have developed. They did happen here. Happily, it has been resolved. I certainly sympathize and understand the reasons why you think that, in view of what happened here. It should cause you to do something to attempt to make sure it doesn't happen again. I'm not sure that's possible. I'm not sure it's necessarily desirable, if the price we must pay is to sacrifice the appropriate division of powers between the three branches.

Chairman RODINO. Mrs. Schroeder was here and she had to leave, but she has now returned. Mrs. Schroeder.

Mrs. SCHROEDER. Thank you, Mr. Chairman.

What I wanted to talk about is something that came out of another hearing that disturbed me very much about the Justice Department. I chaired the Civil Service Committee, and we had in front of us the Equal Employment Opportunity Commissioner, who told us the Justice Department has not filed an affirmative action plan under the Federal rules, and that all they can do is have tea with you and try to persuade you, but they haven't been able to persuade you yet. I find that shocking. The American public is looking to the Justice Department to be out enforcing civil rights. Yet your Department is one of only five that has not complied with the law.

Mr. SMITH. Well, we disagree with the fact we are not complying with the law. Actually, we are in the process of developing an EEOC report which has not been finalized yet. As soon as it has been finalized, we will submit it. There is some question as to the proper form for that report. Some areas that are being worked on, and I hope will be resolved before too long. Once it is resolved we will file.

Mrs. SCHROEDER. But it is overdue.

Mr. SMITH. Well, I can't tell you what the due date was.

Mrs. SCHROEDER. EEOC officials said that the last time they met with Justice Department officials there was some question as to

whether they were going to file one. You're telling me you will file one?

Mr. SMITH. We will file one. The question is not filing an EEOC report, the question is, what it should contain.

Mrs. SCHROEDER. It's an affirmative action plan for hiring in the Justice Department, they were just distressed about. You have not filed an affirmative action plan.

Mr. SMITH. Well, as I say, there is some issue there. But exactly what the issue is, I'm not sure, but we are going to process it. I hope we're working that out.

Mrs. SCHROEDER. The other question I have, from my Armed Services Committee, is in reference to the the Thomas Reed affair. On "60 Minutes," they made an allegation that the information given to give him the "Q" clearance was not correct.

Do you know anything about this? Are you going to rescind that clearance or recommend that be rescinded? I know you are very concerned about leaks. There are plans to institute a lie detector program, and so forth. What do we do about this? Or was "60 Minutes" totally wrong?

Mr. SMITH. Well, I'm sorry, I really cannot comment on that case in any way.

Mrs. SCHROEDER. You can't comment? Well, is the Justice Department in that case at this time?

Mr. SMITH. Well, I really can't comment on it. You just don't comment with respect to what is being investigated by the Department.

Mrs. SCHROEDER. I see. So for those of us who are worried about what this means, the allegations of insider trading and the grand jury and everything, we don't know if you're going to intervene or not.

Mr. SMITH. I'm afraid we just can't help in that respect, because of the nature of our function.

Mrs. SCHROEDER. OK.

Well, I had a whole series of other questions, Mr. Chairman, but I won't hold anybody up.

I really implore you to please file your affirmative action plan.

Mr. SMITH. We will do our best.

Mrs. SCHROEDER. I find that terribly distressing that the U.S. Justice Department has not done that.

Chairman RODINO. Well, I want to thank you again, Mr. Attorney General, for your appearance here today and patience. And again, I appreciate the fact you have agreed to give us further information and develop further questions in seeking certain information and documents, because we would like to know whether or not we are going to proceed legislatively or otherwise, but at least consider this question, so that we have some idea in our mind as to whether or not it is just something that won't be legislated or should be legislated, should be left to history, or whether or not we want to deal with it.

Mr. SMITH. You can be assured, Mr. Chairman, our desire and our goal and our purpose is to cooperate fully. It is only in those areas where we feel that we have to take certain positions that we would do so, and you can certainly be assured that will only

happen after very serious and thoughtful consideration and, hopefully, discussions with you.

Chairman RODINO. We will be in touch with you, as we have been, and thank you very much.

That concludes this hearing.

[Whereupon, at 1:40 p.m., the hearing was adjourned.]

ADDITIONAL MATERIAL

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JUDICIARY COMMITTEE

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

5 MAY 1983

Honorable Peter W. Rodino, Jr.
Chairman
Committee on the Judiciary
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

On behalf of the Attorney General I am forwarding the attached responses to questions you submitted as a follow-up to the Attorney General's testimony before the Committee on the Judiciary on March 15.

Sincerely,

Robert A. McConnell
Assistant Attorney General

Attachment

U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
WASHINGTON, D.C. 20515

STAFF MEMO

May 17, 1983

TO: All Chief Counsel

FROM: Alan A. Parker

Attached is a copy of the Justice Department's response to questions submitted to the Attorney General subsequent to his testifying before the full Committee on March 15.

AAP:dfm

(1)

Q. Concerning the Civil Division, there is no provision in your request for funds to pay private attorneys in conflict of interest cases arising out of Bivens or constitutional tort actions. Two years ago you indicated that the private counsel program cost an average of $400,000 annually. How will you pay these attorneys?

A. As part of our budget proposal for fiscal year 1984, we have asked for $493,000 to pay private counsel. Experience for the past two fiscal years indicates that we are spending in excess of $400,000 for private counsel per fiscal year. Of course, in any given year we do not know with certainty what amounts we will have to spend on private counsel because we do not know exactly the number of cases we will have.

(2)

Q. The Administration is seeking a $103 million capital investment in Federal prison bedspace -- the largest increase in the history of the Federal prison system. Considering the fact that this figure can be multiplied by 16 (according to Allen Breed, National Institute of Corrections) to reach the operating costs of prisons over a 30-year life (1.6 billion), how can you justify such high debt incursion by the Federal government? How did you project prison populations?

A. The Federal Prison System is currently housing nearly 30,000 offenders in institutions designed for a capacity of 24,000, an overcrowding rate of 25 percent. Inmate population in Federal institutions has increased more than 5,500 in two years and continues to grow at an alarming rate. Failure to act to reduce this critical level of overcrowding could lead to increased violence and higher escape rates in our institutions, and to serious criticism from the Federal Judiciary regarding overcrowding and conditions of confinement. The Department has determined not to let prison overcrowding thwart the effectiveness of our Federal law enforcement efforts.

The Bureau of Prisons has always emphasized alternatives to the construction of new facilities and the most cost-effective approaches to expansion of prison capacity. Construction of new facilities is the last course of action. The budget request for 1984 reflects the maximum use of available alternatives:

Expansion of Existing Institutions. Over the past few years the Bureau has added over 1,700 beds at 10 existing institutions. Currently, 539 additional beds are under construction at 5 existing institutions and 1983 funds provide for another 780 beds at 7 existing institutions. The Department's 1984 request for 340 additional beds at 3 existing institutions represents nearly all of the expansion that can be accomplished at existing institutions.

Acquisition of Surplus Properties. The Bureau constantly reviews and inspects available surplus properties for possible prison use and has successfully expanded capacity by some 4,800 beds over the past several years through the acquisition of such property. Currently, the Bureau is reviewing three surplus properties for possible conversion to prison use.

Increased use of Community Treatment Centers (CTC). Since January 1982, the Bureau has increased the average daily population of inmates in CTC's from 948 to nearly 2,000 today. The 1984 budget requests an increase of $6 million to further increase the number of inmates in CTC's to approximately 2,300, which will further reduce the level of institution overcrowding.

Despite the extensive use of alternatives to new construction, the rapidly increasing prisoner population requires the addition of capacity through new construction. The Bureau's 1984 request for an increase (capital) of $90 million includes $40 million for the construction of a 500-bed Metropolitan Correctional Center in Los Angeles to provide a long term solution to a serious detention problem in that area. An additional $37.5 million is requested for construction of one 500-bed Federal Correctional Institution and for site acquisition and planning for another 500-bed Federal Correctional Institution, both of which are urgently required in the northeast region where prison overcrowding is most severe. The remaining $12.6 million is requested to continue the modernization of the Leavenworth Penitentiary ($8.5 million) and to provide for critically needed renovation at 11 existing institutions ($4.1 million). The total capital request in 1984 for additional capacity is $83.5 million, including the $6 million for 340 additional beds at existing institutions contained in the Department's 1984 request for the Organized Crime Drug Enforcement Program.

The cost of operating our entire existing system for 30 years would be $11.9 billion ($397,422,000 x 30). The additional 1,840 beds requested represent a 7.7 percent increase and if we assume a similar increase in our 30 year costs it would

represent a debt incursion of $916.4 million. If we want to remove criminal offenders from the street, and we believe the public so wishes, then this is a cost we must be willing to bear.

Concerning projections of prison populations, a variety of statistical methods were used and are included in our report Federal Inmate Population Projections 1983 - 1987. A copy of this report can be made available at your request.

For 1987 the Bureau projected a population of 31,300 which represents a conservative 2 percent a year increase from the base year 1982.

(3)

Q. In a speech on March 3, 1983, you indicated support for increased alternatives for non-violent offenders. What percentage of Federal offenders fits your definition of "non-violent?" Couldn't more of these prisoners (and pre-trial detainees) be placed in camps and community-based facilities?

A. The non-violent offender that I spoke of is the non-habitual non-violent offender. Very few of the present Federal inmate population meet that definition. Although the information readily available for analysis is limited, our research indicates less than 3 percent of the committed Federal inmate population would meet the definition of non-habitual non-violent offender.

The Bureau seeks through its classification system to place in minimum security camps all those inmates who can safely be placed in camps. Currently, 30 percent of the population is classified for minimum security housing.

We believe that the courts are already doing a careful job of screening pre-trial offenders for placement. Offenders are detained only when it is necessary to ensure their appearance in court or to provide for the safety of the community. It is important to remember that only one-third (32%) of all offenders under Federal supervision are confined in institutions. The remaining 68 percent are under community supervision programs such as pre-trial diversion, probation, parole, or in Community Treatment Centers.

As mentioned earlier, we are seeking $6 million in 1984 to increase the use of Community based facilities. We do not believe we can safely expand this program much further.

(4)

Q. Since you are requesting $10-20 million in additional funds for State and local correctional facilities which house Federal detainees and prisoners, what conditions, if any, do you place on the receipt of such funds regarding the improvement of such facilities to meet minimal constitutional and statutory standards for Federal or State facilities?

A. The primary thrust of the U.S. Marshals Service Cooperative Agreement Program (CAP) is to ensure that adequate detention space which is in compliance with State, local, and national detention standards is available for Federal prisoners housed in non-Federal facilities. The CAP criteria, which the Service utilizes when determining which priority CAP projects will be approved and funded, are as follows:

1. Facility is located in or near a Federal court city.

2. Facility is or could be a major use jail (i.e. one in which the Service uses 1,000 or more jail days a year).

3. Facility is willing to guarantee bed space for Federal prisoners for a specific period of time (i.e. 15 years in the case of construction projects).

4. Facility is working to improve its substandard conditions of confinement and is willing to work towards full compliance with local, State, and national detention standards (for example, use of alternative detention facilities for low risk and non-violent type offenders).

5. The projects proposed and eventually funded will significantly improve or completely resolve the specified substandard conditions of confinement.

6. The facility is willing to comply with all CAP guidelines and inspection requirements (i.e. periodic on-site inspections, submission of progress reports, compliance with penalties for only partial performance or non-performance of work, etc.).

7. Facility has substandard conditions of confinement which have been substantiated by a recent U.S. Marshals Service on site jail inspection.

8. Facility is under Federal or State Court order for substandard conditions of confinement or there is serious potential for such through threatened or pending litigation.

(5)

Q. Would you support a modeat amount ($3 million) of funding for partial implementation of the Dispute Resolution Act -- $1 million could be allocated for a center, including a clearinghouse, and $2 million for pilot projects? (Public Law 96-190 authorized $1 million for a resource center and $10 million a year for projects.) Wouldn't such a modest investment actually save the Federal government money in the long run, especially if it reduced litigation costs?

A. The Department of Justice has long supported the Dispute Resolution program in Congress and continues to believe that the Program has great merit. However, because of the need to reduce Federal spending, the Department has other, higher priority responsibilities that take precedence over the Program. Consequently, the Department is not in a position to request even a modest amount of additional funding for the Dispute Resolution Program.

The Department also believes that financial support for the study and implementation of dispute resolution programs should come principally from State and local governments. Because the great majority of civil disputes arise under State law, it is State and local governments that the Dispute Resolution Program is meant to assist. Thus, even if it were to be successful, the Program would not significantly reduce Federal litigation costs.

Moreover, many groups in the private sector also have begun to develop alternative means of dispute resolution. The Department applauds these efforts and will continue to provide whatever support and guidance it can. The Department of Justice's Federal Justice Research Program, in fact, recently funded a project on Dispute Resolution and Public Policy that will be administered by the National Institute of Dispute Resolution.

(6)

Q. The Justice Department has stated that the Article I bankruptcy proposal introduced as H.R. 1401 (98th Congress, 1st Session) would be subject to the same "constitutional infirmities as the Northern Pipeline case found in the 1978 Act and would only perpetuate the kind of uncertainty we have today."

A. Are serious constitutional questions raised by the Heflin bill (S. ____) which was passed by the Senate Judiciary Committee on March 22, 1983?

B. Would the Heflin bill resurrect the costly delays and wasteful jurisdictional litigation which plagued the bankruptcy system prior to 1978?

A. The Department has stated in the past that any bankruptcy court system which vests significant jurisdiction over matters involving the resolution of questions of State law in Article I bankruptcy judges would raise constitutional concerns. The plurality and concurring opinions in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 102 S. Ct. 2858 (1982), left many constitutional questions unresolved. Whenever the parties to a bankruptcy proceeding raise such constitutional issues, the validity of these concerns would have to be settled in the courts, perhaps ultimately by the Supreme Court.

This is not to say, of course, that any Article I bankruptcy court system is inherently unconstitutional. Indeed, the bill reported by the Senate Judiciary Committee on March 22, 1983, includes several provisions evidently designed to support its constitutionality. The provision for an automatic recall of any "related proceeding" based on State law upon the motion of a party, snd for discretionary recall of other proceedings, would allow the district and bankruptcy courts to minimize the occasions for jurisdictional challenges. The provisions for the designation of bankruptcy judges to prepare proposed findings and conclusions in recalled proceedings are modeled on the existing powers of United States magistrates and of masters. Finally, the bill ultimstely limits bankruptcy judges to the exercise of judicial authority that is "not inconsistent with the Constitution."

Although these provisions would have to await litigation for an ultimate determination of their meaning and scope, together they combine to present an approach that, given its relisnce upon Article I judges, reflects a careful effort to satisfy constitutional prerequisites in a number of respects.

The bill approach by the Senate Judiciary Committee is modeled rather closely upon the provisions of the Emergency Rule drafted by the Judicial Conference and currently in effect. Apparently, the Committee anticipates that the Article I court system will be able to function at least as effectively as the bankruptcy courts have been functioning under this Rule. Although it is almost impossible to predict the effect of the Committee bill,

at the least the passage of such legislation would resolve the current disputes over the scope of bankruptcy jurisdiction in the district courts and the source of authority for the promulgation of the Emergency Rule.

As noted above, the Committee bill may lead to initial litigation over the meaning of its provisions and the scope of jurisdiction that may be exercised by an Article I bankruptcy judge. However, the recall provisions of the bill may allow the district and bankruptcy courts to minimize the occasions for jurisdictional challenges. Moreover, by retaining unchanged the broad jurisdictional grant of the 1978 Act (except for "related proceedings" based on State law where a party objects), the Committee bill should avoid most of the kinds of disputes over the summary jurisdiction of the bankruptcy referee that occurred under the former Bankruptcy Act.

(7)

Q. In your October 29, 1981 speech before the National Legal Council, you were highly critical of judicial activism.

A. Given this attitude, how do you explain the amicus brief filed by the Department of Justice urging the Supreme Court to change the law for the last 80 years with respect to retail price-fixing? (Monsanto Co. v. Spray-rite Service Corp., No. 82-914, filed Jan. 1983).

A. At the turn of the century, Congress created the general statutory framework for government intervention in the marketplace, a framework that remains largely unchanged today. Its cornerstone is the Sherman Act, whose substantive provisions make unlawful every "contract, combination . . . or conspiracy, in restraint of trade" and conduct to "monopolize, or attempt to monopolize . . . any part of . . . trade." These provisions are broadly phrased and embrace fundamental concepts with constitutional generality and simplicity. By providing only general guidance, the framers of the Sherman Act did not abdicate their responsibility any more than did the Framers of the Constitution. Rather, the Sherman Act was written with awareness of the diversity of business conduct and with the knowledge that detailed statutes would lack the flexibility required as new forms of business conduct arose and as economic conditions evolved. To provide this flexibility,

Congress adopted legislation that has permitted a common law development and refinement of antitrust law. Associated General Contractors of California, Inc. v. California State Council of Carpenters, No. 81-334, slip op. at 11-13 (U.S., Feb. 22, 1983).

An adaptive approach to antitrust law is necessary both because of the diversity and rapidly changing nature of business conduct to be scrutinized, and because of the continuing progress of economic theory in explaining why firms pursue certain strategies and the competitive consequences of their behavior. As the courts gain experience through scrutiny of challenged conduct and as economic theory continues to provide a more complete understanding of business conduct, it is inevitable that potential improvements or refinements in past applications of antitrust law will be recognized as desirable. It is incumbent on the courts to recognize and to grasp these opportunities to change their previous interpretations.

In Dr. Miles Medical Co. v. John D. Park & Sons, 220 U.S. 373, 404-09 (1911), the Supreme Court held that vertical price-fixing is equivalent in all respects to horizontal price-fixing and constitutes an unlawful restraint on alienation. In subsequent decisions, the Court continued to make that assumption. However, as Justice Holmes noted in his dissent in Dr. Miles, resale price maintenance had not been shown to be anticompetitive on balance as had horizontal price-fixing, and there wss no reason to believe that vertical price-fixing uniformly would be anticompetitive. Moreover, economic research subsequent to Dr. Miles has provided considerable support for the proposition that in certain characteristic commercial circumstances, resale price maintenance can increase competition and improve consumer welfare. In Monsanto Co. v. spray-Rite Corp, No. 82-914, filed Jan. 1983, the Supreme Court has the opportunity to reassess the assumption on which it based the per se illegality of resale price maintenance. We have urged the court to take this opportunity as part of its long-recognized responsibility to continue the common law development of antitrust.

B. Are you aware that the Congress as recently as 1975 endorsed the prohibition on retail price-fixing by overwhelmingly repealing the Miller-Tydings Act (which gave an antitrust exemption for State retail price maintenance -- "fair trade" -- schemes)?

A. The 1975 legislation repealing the Miller-Tydings Act eliminated the antitrust immunity provided by State fair trade laws to resale price maintenance agreements, regardless of their economic effects

in particular circumstances. This legislation was unambiguous in its intent to place resale price maintenance under antitrust scrutiny. While some members of Congress in 1975 may have believed they were returning resale price maintenance to a rule of per se illegality, nothing in the language or history of the 1975 legislation suggests that Congress intended to codify for all time the per se rule against resale price maintenance, and thereby to deprive the Court of the flexibility, under the common law approach to antitrust just discussed, to refine or change that rule as business conditions, economic learning, and judicial experience might require. To the contrary, given that common-law tradition in the Court's approach to antitrust, it would be more likely that Congress intended that the antitrust law of resale price maintenance should be amenable to the judicial evolution of doctrine characteristic of all other types of restraints examined under Section 1.

C. If the Department wants to change the law on retail price maintenance, why does it not submit this matter to the Congress?

A. As noted above, the antitrust law of resale price maintenance was originated by the courts over 70 years ago, with the 1911 Supreme Court decision in Dr. Miles. With the exception of the period beginning with enactment of fair trade legislation and ending upon the subsequent repeal of that legislation, Congress has left the development of the law of resale price maintenance to the courts. Consequently, in the first instance, the courts should be given the opportunity to reconsider their prior interpretations on this issue.

(8)

Q. The Antitrust Division's budget request for Fiscal Year 1984 includes a request for 704 full-time permanent positions. In his March 10 appearance before the Subcommittee on Monopolies and Commercial Law, Assistant Attorney General Baxter indicated that at one point, you had considered transferring between 30 and 100 lawyers from the Antitrust Division to U.S. Attorney Offices around the country for purposes of drug enforcement activities.

A. Are you still considering such a personnel change?

The Department of Justice expects presently to submit to Congress a budget amendment that requests the transfer of 31 attorneys and 24 support personnel from the Antitrust Division to the U.S. Attorneys in order to bolster the Department's law enforcement capabilities at the local level. It is our hope that these transfers can be accomplished through voluntary requests for transfer from Division personnel to the offices of the U.S. Attorneys.

B. What effect will such a reduction in work force have on the Antitrust Division's enforcement activities, which have already significantly declined during the past 2 years?

A. First, I disagree with the assumption in the question that the Antitrust Division's enforcement activities have "significantly declined" during the past two years. In fact, despite staffing reductions that have occurred during the past two years, the number of cases initiated hss actually increased -- in 1982 we filed 112 cases, reflecting an increase of 16 over 1981. That number, in turn, was an increase of 13 over the number of cases filed in FY 1980.

Second, it is anticipated that, as a result of increased efficiencies through the use of modern automated litigation support and increased emphasis on sophisticated economic analysis in the early stages of investigation, there will be no significant reduction in the Division's effectiveness from the proposed transfers of attorneys from the Antitrust Division to the U.S. Attorneys Offices as described in the answer to Question 8A above.

(9)

Q. Do you think it is an efficient allocation of Department resources for the Antitrust Division to intervene at the trial level on behalf of defendants charged with retail price-fixing? (Most recent example: On March 8, the Division intervened on behalf of the defendant in the Apple Computer case, in the Central District of California.)

A. To date, the Department has not intervened at the trial level on behalf of defendants charged with retail-price fixing. We

did file an amicus brief in O.S.C. Corp. v. Apple Computer, Inc., Civ. No. 81-6132, in the Central District of California, on a motion for summary judgment, but the brief took no position on the merits of the plaintiffs' case.

The body of antitrust precedent includes numerous decisions in cases brought by private plaintiffs as well as by the government. Many major Supreme Court antitrust decisions, such as Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., Continental T.V., Inc. v. GTE Sylvania Inc., and Albrecht v. Herald Co., stemmed from private actions. Because of the government's responsibility as the nation's chief enforcer of the antitrust laws, it has a strong interest in the precedential implications of these private actions. Accordingly, the government appears as amicus curiae in appropriate cases in order to attempt to influence the approaches used in resolving such cases. This practice is well accepted in antitrust proceedings before the Supreme Court; indeed, the Court frequently requests the government's views on the merits of antitrust issues before it as well as our views as to whether certiorari should be granted in particular cases. Private csses that present important antitrust issues and that are ripe for decision (i.e., issues properly framed, discovery completed, etc.) provide a low-cost, and therefore efficient, means for us to present our views of the public interest to the court.

In the current Administration, the Department has increased its efforts to present its views as amicus not only before the Supreme Court, but also before Courts of Appeals and the Federal District Courts. The Department generally will consider involvement as amicus when (1) the issue before the court is one of significance to the development of antitrust jurisprudence; (2) precedent is lacking or raises barriers to the efficient operation of firms or markets; and (3) the essential facts are not in dispute. Our interest is not in supporting any "side" in such litigation; rather, it is to assist the courts in their analysis of the issues before them and to present the government's views regarding those issues. Thus, the Department will consider equally supporting either plaintiffs or defendants, and in fact, we have filed briefs supporting plaintiffs as well as defendants. We have also filed briefs that only set forth our views on the legal standards to be applied by the court, without examination of the merits of either the plaintiff's or defendant's case.

Since the beginning of the Reagan Administration through the end of March, 1983, the Department has filed nineteen amicus briefs before the Supreme Court, eleven amicus briefs before the United States Courts of Appeals, and two briefs (one by request of the

court) before Federal District Courts. The number of such amicus filings is expected to increase significantly during Fiscal Year 1983-84.

In Apple Computer, the complaint charged that in response to complaints about mail-order price cutting, Apple threatened to terminate any dealer who sold Apple computers by mail. The plaintiffs, Apple dealers who sold primarily through the mail, alleged that the prohibition against mail-order sales is per se unlawful under the Sherman Act because it is a product of a horizontal dealer conspiracy and because it constitutes vertical price-fixing. Defendants have moved for summary judgment.

The Department's amicus brief states the showing required of the plaintiffs to avoid summary judgment; however, it takes no position as to whether the plaintiffs have discharged that burden. The brief first argues (1) that mere evidence that two or more Apple dealers complained about mail-order sales legally is insufficient to permit an inference of agreement among Apple dealers or between Apple and its dealers; (2) that Apple's prohibition against mail-order sales is not per se illegal because it is a non-price vertical restraint governed by GTE Sylvania rather than a vertical price-fixing agreement, and accordingly, plaintiffs may not prevail unless they establish that the prohibition has an actual or probable anti-competitive effect; and (3) that, in this case, a necessary condition for such an anticompetitive effect is that both the manufacturer and the complaining distributors possess market power in their respective markets. By submitting the brief, the Department hoped to assist the district court in understanding the complex legal issues involved in disposing of the motion. The Department has no interest in seeing that one party or the other prevails on the motion beyond its interest that the proper standards of law be applied.

(10)

Q. RE DEA: The Intelligence program is the heart of an effective investigation of sophisticated underworld activity such as drug trafficking. However, in the 1982 reprogramming, 68 positions were eliminated from that program. Consequently the Special Field Intelligence Program that fills critical operational and strategic intelligence gaps was reduced from 40 in 1981 to 7 in 1982. The identification responses regarding possible enforcement targets was reduced from 50,000 in 1981 to 17,000 in 1982. Even the workload of the El Paso Intelligence Center was substantially below expectations in 1982. Why isn't the intelligence program going to be restored to its 1980 and 1981 levels in the 1984 budget?

A. It is true that increases were requested initially for this program. This was done during the early consideration of DEA's budget by the Executive. All the requests were considered during the internal consideration of the budget and the decision on the final requested funding levels were based on our perception of the priorities that the FY 1984 budget needed to address. The choices in the funding of these priorities are reflected in the President's FY 1984 budget request for the Department which is now pending before the Committee. We should add that when we discussed the requested increases for this program we took recognition of the fact that DEA's top management had earlier reduced positions for this program by its own choice. DEA's decision in turn influenced the final decision on setting priorities for the DEA's as well as the Department's budgetary needs.

(11)

Q. RE DEA: The diversion of prescription controlled substances is responsible for 70 percent of all deaths and injuries related to drug abuse. However, this program has been steadily cut from 408 workyears in 1981 to 324 workyears in the 1984 request. Why is the Administration continuing to cutback on the drug enforcement program that deals directly with the drug abuse problem that is the cause of 70 percent of all of the deaths and injuries related to drug abuse?

A. The Diversion control program is valuable and thus only critical circumstances would justify reducing the resources allocated to this program. In reorganizing the DEA for the purpose of providing a more effective operation between the field and Headquarters, a management decision was made to maintain the existing Agent staffing and associated support levels. This decision required the temporary reduction of resources in several programs including the diversion control program.

The existing diversion control program is successfully and effectively managed and notwithstanding the reduction in resources has been able to continue to carry out its broad responsibilities with a minimum of disruption.

(12)

Q. INS Budget: The budget presented for the Immigration and Naturalization Service for FY 1984 totally disregards this Committee's authorization action last year in which we voted to increase INS resources by 642 positions and over $29 million.

The budget as submitted, except for an increase in funds for Automated Data Systems, a National Records Processing Center and certain uncontrollable expenses, is a status quo budget much like those of the past three years.

With immigration described as "out of control", with workloads continuously mounting, with new pressures exerted on our Southwest border because of the serious economic conditions in Mexico and warfare conditions in El Salvador, why was not the enforcement portion of the budget, at least, given substantial increases to meet these serious conditions?

A. The Administration, together with the help of Congress, has provided considerable support for INS' mission. In a 1982 amendment, INS gained an additional 1,073 positions, 852 workyears and $65 million to enhance its enforcement and service to the public efforts. However, the FY 1983 enacted appropriation did not provide the funding commensurate with the House Judiciary Committee's authorization action.

The Administration is totally committed to passage of the Immigration Reform and Control Act of 1983. We believe that passage of the legislation is critical to regaining control of our borders and establishing an orderly immigration process.

The Administration plans to submit either a FY 1983 supplemental budget request or an amendment to the FY 1984 budget depending on when immigration reform legislation is enacted. Preliminary estimates for the legalization and employer sanctions portions of the bill range from $110 million to $150 million. The estimates do not inlcude requirements for enhanced border enforcement which are presently being developed. It is important to note that these estimates are preliminary and are subject to OMB approval and changes depending on the provisions included in the final version of the bill.

(13)

Q. Immigration Bill: This Committee will shortly be considering the Immigration Reform and Control Act of 1983, H.R. 1510. Many

of my colleagues have certain misgivings on this legislation because they do not have sufficient confidence that the Administration will provide the necessary funding to implement the bill. They will point to the FY 1984 budget as a clear indication that the Administration is not serious about solving the serious immigration problems which we face in this country.

How do I respond to my colleagues to allay their fears. Can the Department give me categorical assurance that no matter what the cost is for implementing this immigration reform the necessary funda will be forthcoming?

A. The Administration is totally committed to passage of the Immigration Reform and Control Act of 1983. We believe that passage of the legislation is critical to regaining control of our borders and establishing an orderly immigration process.

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It is clearly the intent of the legislation and the Administration that all of the costs for legalization will in fact be recovered by application fees, so this money would be actually netted out to zero, but we would need the start-up funding for the program.

(14)

Q. Naturalization Backlogs: On February 9, 1983, I wrote a letter to the Department requesting urgent attention be directed to the naturalization functions of the Immigration and Naturalization Service. To date I have not received a detailed response and I would appreciate receiving the Department's ideas on how INS can improve its naturalization operations so that persons who want to become citizens do not have to wait two years to be processed?

A. More manpower?
B. More money?
C. Streamlining services?

A. INS currently has an average 6.1 months' pending Applications to File Petition for Naturalization (N-400) workload. This is down from an average of 7.5 months at the end of FY 1981. As a result of various steps taken by the Congress and INS, we expect to make measureable progress in improving the processing time for naturalization cases and reducing backlogs in FY 1983 and 1984.

First, although the effect of the efficiency legislation passed by Congress at the end of 1981 was not felt until the second half of FY 1982, available data since then indicates production during that period was improved by 22 percent and ultimately one-third more N-400's per year may be processed as a result of this measure.

Second, as a result of the reorganization and merger of the naturalization and adjudications programs, which became effective January 1, 1983, INS has been able to take steps to better deploy its resources to address workloads. As part of the overall reorganization plan and INS attorney consolidation plan, general attorneys are being gradually phased out of naturalization processing and replaced with immigration examiners, whose duties are being expanded to include naturalization. This will give INS added flexibility to its workforce - immigration examiners will be able to do both adjudications and naturalization work as needed. INS expects to fill all vacancies resulting from the reorganization and attorney consolidation plan by May 1983 and is taking steps to convert its paralegals to immigration examiners. As vacancies are filled and the immigration examiners gain experience in doing naturalization work, production will increase.

Third, INS is planning to install the automated Naturalization Citizenship Casework Support System (NCCSS) at four to seven locations in FY 1983. The first of these installations is in place at Los Angeles. An additional 15 to 20 installations are anticipated in FY 1983. This system will provide information on past and future cases and will produce notification letters, interview schedules, dockets, etc., and help INS better manage and track its caseload and serve the public.

Fourth, The Adjudications and Naturalization Division is examining the extent to which it can improve production through balanced use of remoting, regional adjudications centers, up-front processing and traditional methods of processing. In addition, the Division is planning to conduct a test to determine whether up-front processing of naturalization applications would improve productivity and service to the public. It is also planning to test a profiling system to improve scheduling of interviews so as to make better use of officer time.

The key to future improvements in the naturalization area is passage of legislation to allow administrative naturalization which would eliminate the paperwork and processing requirements imposed by the present court proceedings.

(15)

Q. Has the Department submitted its Affirmative Action Plan to the EEOC and, if not, when does the Department anticipate doing so?

A. I welcome the opportunity to provide additional information on the Department's position on this matter and to reiterate our continuing commitment to assure equal opportunity to all of our employees and applicants for employment.

The EEOC apparently grounds its requirement for the filing of affirmative action plans in Section 717 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq. Title VII, however, does not require the filing of affirmative action plans, it calls for the filing of equal employment opportunity programs.

The difference is more than one of semantics: neither the statute (Section 717(b), 42 U.S.C. 2000e-16(b)), nor the regulation require "affirmstive action," nor does either require hiring or promotion goals. On the contrary, the statute and regulation require an affirmative program designed to ensure equal employment opportunity. The regulation itself prohibits the imposition of goals. This Department has long been on record as opposing quotas, and hiring and promotion goals which require or encourage preferences based upon race, national origin or sex to persons who are not victims of discriminatory employment practices.

The management directives which were adopted by the EEOC in the last years of the last Administration require numerical objectives which might be read as quotas or as imposing a preference--contrary to our policy. We do not believe the law requires this Department--or other Departments--to adopt numerical formulae which require or might lead to the granting of improper preferences. We so advised Acting Chairman J. Clay Smith in September 1981.

Since that time, we have been in informal contact with Chairman Clarence Thomas in an effort to resolve differences on the form and format of the equal employment opportunity program.

This Department is fully committed to the concept and implementation of equal employment opportunity, not only in its capacity as an enforcement agency under Title VII of the Civil Rights Act of 1964, but also in its capacity as an employer under that Act.

We have completed recently a report on equal employment opportunity for disabled veterans in accordance with guidelines established by the Office of Personnel Management. We also instructed our bureaus to prepare a report dealing with our program for the handicapped and a separate report for minorities and women. The handicapped report was forwarded to EEOC and the minorities and women's report will be forwarded by June 1, 1983. These reports will demonstrate our continuing commitment to the principle of equal employment opportunity.

(16)

Q. On several occasions, representatives of the Department have urged this Committee to proceas continuing resolutions providing authorization for the Department of Justice during periods prior to the enactment of a complete authorization bill. Representations were made at those times that lack of a specific authorization would seriously impair law enforcement and other functions of the Department. The authorization expired on February 1, 1982, and the Department operated without authorization until the adoption of the continuing appropriation bill several months later. What were the detrimental effects, if any, of a lack of authorization during those months?

A. Problems have developed in several areas when the Department's Authorization bill is not enacted in a timely manner or when a resolution extending the current Authorization is not enacted.

Current law prohibits the government from engaging in certain activities which are considered necessary in the operation of a successful undercover investigation. For example, the FBI is prohibited from depositing in excess of $100,000 in a bank account, or using the proceeds of undercover operations to offset expenses. Other activities including the purchasing of real and personal property, leasing space, establishing or acquiring proprietary corporations or business entities also should have express Congressional approval. Authority to perform these functions is found in certain exemptions now written into our authorization legislation. Problems have developed when there are lapses between authorization bills. These lapses remove the express authority to use the above techniques in an undercover operation.

Any sudden change has the potential of seriously threatening the safety of the undercover Agent running the operation. For example, the inability to deposit in excess of $100,000 in a bank account immediately endangers and curtails undercover operations using "show money." Show money is used to establish credibility, financial stability, and business assets. We cannot open multiple bank accounts where show money exceeds $100,000 and appear normal.

Many undercover operations are operated as normal business entities. This requires the receipt of income and the disbursement of expenditures on a day-to-day basis in a normal fashion to maintain cover. Cash receipts are thus deposited in a bank account and expenditures are made from that account. During a hiatus in authorization bills, authority to use income to offset expenses lapses and there is considerable risk of exposure of the business cover. Informants and/or undercover Agents may be exposed and subjected to possible physical retaliation.

There is a considerable impact also on many of the Department's other activities when the regular Authorization bill is not enacted in a timely manner.

For the last several years, for example, the Department has requested authorization to provide for the relocation of law enforcement employees and their families in emergency situstions, primarily because of a threat to life.

We have also requested authority to contract for expert witnesses on the basis of demonstrated competence and qualifications not based entirely on price competition. The Department is placed at a decided disadvantage if it is not permitted to procure witnesses on the same basis as its opponents. Without authorization, we cannot act in these instances.

Also, we have requested exemptions in the Authorization bill which are essential to implementing the intent of Congress.

Title V of the Refugee Education Assistance Act of 1980 (Public Law 96-422), for example wss added primarily to provide Federal reimbursement for State and local government expenditure for Cuban and Haitian entrants. However, because of the way 501(e) of the Act defines Cuban and Haitian entrants, funds provided for this program could not be applied to Cuban and Haitian entrants who were under "final, nonappealable, and legally enforceable orders of deportation or exclusion." Since Cuba will not accept these individuals, language was necessary to authorize the Department of Justice to carry out the processing, care and maintenance activities associated with Title V for all Cuban and

Haitian entrants notwithstanding the restricting clause. Congressional staff indicated that the Department's Authorization bill was the proper vehicle for removing the restriction since the issue addressed the use of funds and general operational priorities. Since the Authorization bill was not being considered in a timely manner in FY 1983, the Department was required to find another legislative vehicle that would provide the proper relief.

Failure to enact an authorization bill in a timely manner certainly impacts on our activities. So much so, that the Department was forced also to seek a continuation of its Authorization within the Continuing Resolution for the Appropriation for FY 1983.

We believe, it is critical that the Department be provided a reasonable expectation of continuity for its basic programs. The current authorization process does not provide this expectation. On the contrary, it has created an environment which makes planning and program implementation very difficult. Hence, we believe, there is a need for legislation which would take many basic, non-controversial authorities out of an annual authorization cycle and place them into permanent authority. The authorization legislation we are proposing this year would accomplish that.

OFFICE OF PUBLIC AFFAIRS

(17)

Q. For the Object Class 11.3 (Other than full-time employment), our figures are as follows:

1984 (est) -- $98,000
1983 (est) -- $98,000
1982 (act) -- $178,000
1981 (act) -- $55,000

Actual spending in this class increased more than 200 percent between 1981 and 1982.

Q. What were the estimates in this class for 1981 and 1982?

A. Budget Estimates for Object Class 11.3 were:

1981 - $37,000
1982 - $89,000

Q. Why did actual spending in this class increase more than 200 percent between 1981 and 1982?

A. Object Class 11.3 provides funding for "other than full-time permanent employees" such as temporary appointments, part-time employees and consultants. Following the change in Administration, the Office of Public Affairs has begun to experiment in the conduct of several functions not previously fulfilled by this office. Because these functions are experimental in nature, the organization has temporarily hired several qualified individuals from the private sector in an "other than full-time permanent employees" status to coordinate, perform and evaluate the success of these functions. These functions address previously unmet needs in the following areas: teleconferencing and other audiovisual communications; internal communication system to increase dissemination of critical information to DOJ officials; overall coordination for DOJ public speaking engagements of the Attorney General, Deputy Attorney General, Associate Attorney General and other top Department officials; overall coordination for receiving foreign visitors; overall coordination for foreign trips in support of drug enforcement and immigration reform; specific attention to women's issues; overall coordination of the response to increased public interest in the work of the Violent Crime, Victims of Crime and Drug task forces; overall coordination of response to increased electronic media requests, and; a unified team approach to the dissemination of public information. Therefore, the spending in Object Class 11.3 has increased in accordance with this organization's attempt to provide increased services without permanently altering the staff structure.

The change in Administration also brought another type of temporary increase to this object class. In some cases, individuals who eventually were assigned to permanent positions were processed under temporary status while awaiting clearance. Therefore, both the special function employees and temporary employees (who eventually received clearance and became permanent employees) represent the increase in this Object Class.

Q. Why are the 1983 and 1984 estimates $80,000 less than the actual 1982 expenditures?

A. Because it is anticipated that not all of the experimental functions will be permanently retained, and those temporary employees involved with those functions to be discarded will leave the organization's payroll. Also, those employees awaiting clearance should receive permanent employment by that time and further reduce 11.3.

Q. How many workyears do the 1981-1984 figures represent?

A. Assuming an average workyear cost of approximately $30,000, the estimates for Object Class 11.3 represent the following workyears:

1981 - 1.8
1982 - 5.9
1983 - 3.2
1984 - 3.2

Q. What are the comparable figures for the 1980 budget?

A. The 1980 budget for Object Class 11.3 provided:

$22,000 and 1 workyear

(18)

Q. The Public Affairs budget lists 13 permanent positions and 14 workyears. Please provide:

The total number on Public Affairs' payroll?

A. The total number of employees on Public Affairs' payroll is twenty-five.

Q. The title of those on the payroll.

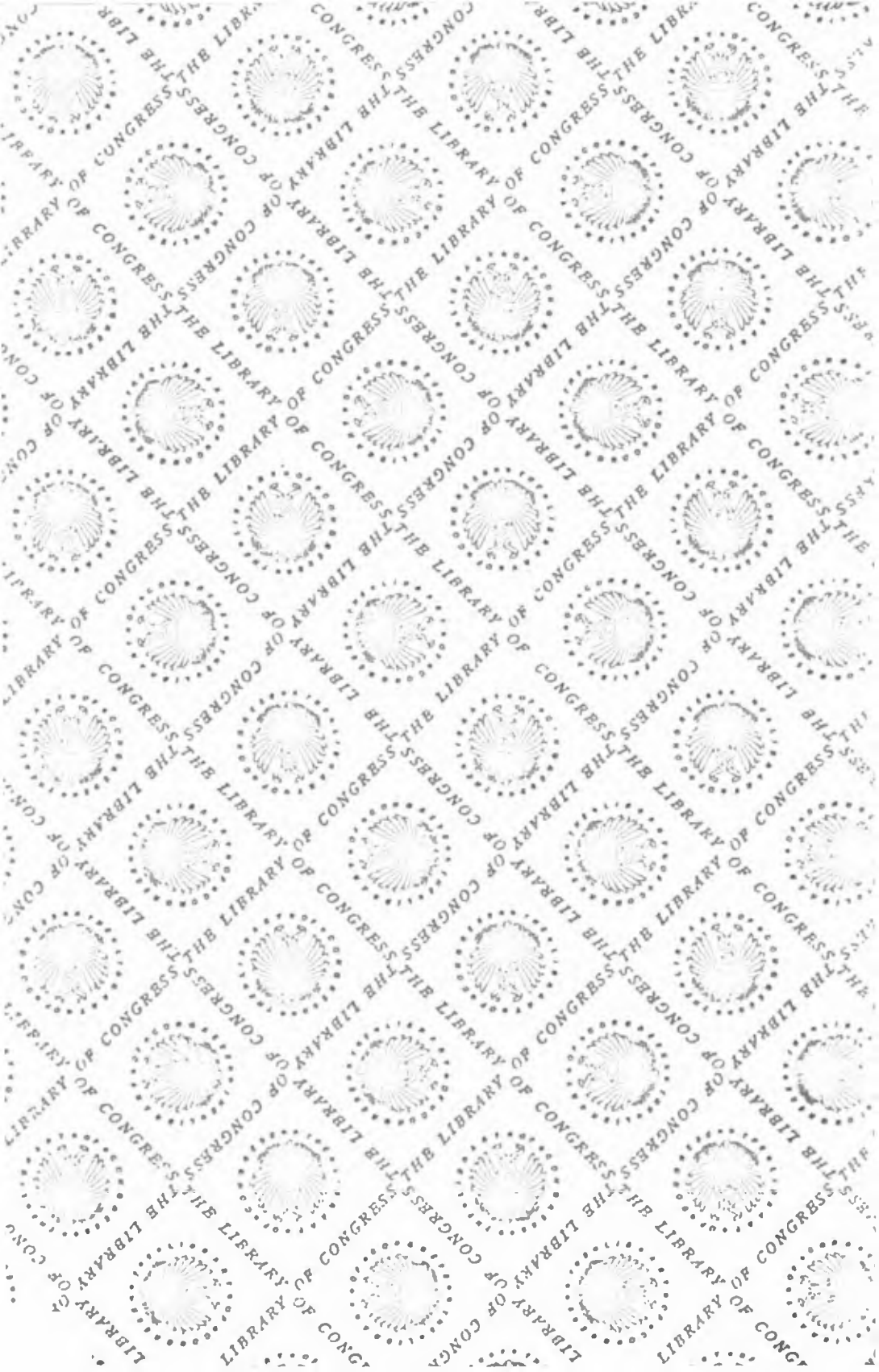
A. The title of those positions on the payroll are:

Director & Special Assistant to the Attorney General
Deputy Director
Special Consultants (2)
Assistant Directors (5)
Confidential Assistant
Special Assistant
Public Affairs Specialist
Staff Assistants (5)
Public Affairs Aides (2)
Secretaries (5)
Intern

Q. The employee salary ranges and the number of employees in each salary range.

A.

Salary Range	Number of Employees
11,949 - 20,255	5
20,256 - 22,306	4
22,307 - 29,373	4
29,374 - 41,276	2
41,277 - 58,499	3
58,500 - 63,114	3
63,115 - 65,499	3
65,500 -	1
	25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